No. 81-55

Office-Supreme Court, U.S.
FILED
JUL 11 1981
ALEXANDER L. STEVAS,

IN THE

Supreme Court of the United States

October Term, 1981

THE PEOPLE OF THE STATE OF NEW YORK,

Petitioner,

against

PAUL IRA FERBER,

Respondent.

On Petition for Writ of Certiorari to the New York State Court of Appeals

PETITION FOR A WRIT OF CERTIORARI

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Question Presented

To prevent the abuse of children who are made to engage in sexual conduct for commercial purposes, could the New York State Legislature, consistent with the First Amendment, prohibit the dissemination of material which shows children engaged in sexual conduct, regardless of whether such material is obscene?

The New York State Court of Appeals answered this question in the negative.

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PAUL IRA FERBER,
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PETITION FOR A WRIT OF CERTIORARI

To: The Honorable Chief Justice and the Associate Justices of the Supreme Court:

The District Attorney of New York County on behalf of the People of the State of New York petitions for a writ of certiorari to review the judgment of the New York State Court of Appeals in this case.

Opinions Below

The opinion of the New York Court of Appeals is set forth at App. A, *infra* and is reported at 52 N.Y.2d 674. The order of the Appellate Division, First Department,

affirming the judgment of conviction without opinion is set forth at App. B, *infra* and is reported at 74 A.D.2d 558, 424 N.Y.S.2d 967. The opinion of the trial judge denying respondent's motion to dismiss the indictment is set forth at App. C, *infra* and is reported at 96 Misc.2d 669, 409 N.Y.S. 2d 632.

Jurisdiction

The judgment of the New York Court of Appeals was entered on May 12, 1981 (App. A, *infra*). The jurisdiction of this Court is invoked under 28 U.S.C. §1257(3).

Constitutional and Statutory Provisions Involved

The First Amendment of the United States Constitution provides, in pertinent part:

> Congress shall make no law . . . abridging the freedom of speech, or of the press. . . .

The Fourteenth Amendment of the United States Constitution provides, in pertinent part:

> [N]or shall any State deprive any person of life, liberty or property, without due process of law . . . .

The relevant sections of Article 263 of the New York Penal Law provide:

> §263.00 *Definitions*
>
> As used in this article the following definitions shall apply:
>
> 1. "Sexual performance" means any performance or part thereof which includes sexual conduct by a child less than sixteen years of age.

2. "Obscene sexual performance" means any performance which includes sexual conduct by a child less than sixteen years of age in any material which is obscene, as such term is defined in section 235.00 of this chapter.

3. "Sexual conduct" means actual or simulated sexual intercourse, deviate sexual intercourse, sexual bestiality, masturbation, sado-masochistic abuse, or lewd exhibition of the genitals.

4. "Performance" means any play, motion picture, photograph or dance. Performance also means any other visual representation exhibited before an audience.

5. "Promote" means to procure, manufacture, issue, sell, give, provide, lend, mail, deliver, transfer, transmute, publish, distribute, circulate, disseminate, present, exhibit or advertise, or to offer or agree to do the same.

6. "Simulated" means the explicit depiction of any of the conduct set forth in subdivision three of this section which creates the appearance of such conduct and which exhibits any uncovered portion of the breasts, genitals or buttocks.

7. "Deviate sexual intercourse" means the conduct defined by subdivision two of section 130.00 of this chapter.

8. "Sado-masochistic abuse" means the conduct defined in subdivision five of section 235.20 of this chapter.

§263.05 *Use of a child in a sexual performance*

A person is guilty of the use of a child in a sexual performance if knowing the character and content thereof he employs, authorizes or induces a child less

than sixteen years of age to engage in a sexual performance or being a parent, legal guardian or custodian of such child, he consents to the participation by such child in a sexual performance.

Use of a child in a sexual performance is a class C felony.

§263.10 *Promoting an obscene sexual performance by a child*

A person is guilty of promoting an obscene sexual performance by a child when, knowing the character and content thereof, he produces, directs or promotes any obscene performance which includes sexual conduct by a child less than sixteen years of age.

Promoting an obscene sexual performance by a child is a class D felony.

§263.15 *Promoting a sexual performance by a child*

A person is guilty of promoting a sexual performance by a child when, knowing the character and content thereof, he produces, directs or promotes any performance which includes sexual conduct by a child less than sixteen years of age.

Promoting a sexual performance by a child is a class D felony.

Statement

On March 2, 1981, Paul Ira Ferber, the owner of a Manhattan bookstore specializing in pornography, sold two films to an undercover police officer. The films are devoted almost exclusively to depicting young boys masturbating. The first film shows a naked young boy lying face down on a bed, rubbing against the bed. After a while, the boy turns over onto his back and masturbates twice to ejaculation.

Then, lying on his side, he places a dildo between his buttocks as if to insert it into his anus. The second film shows a naked young boy masturbating to ejaculation and inserting a dildo into his anus. The second film also includes scenes of other naked boys, including some no older than seven or eight years of age, jumping, sitting and reclining on a mattress. In addition, these boys are engaged in solo and mutual masturbation and in conduct suggesting oral-genital contact. At the end of the second film, the main child performer dresses very slowly, then picks up what appears to be United States currency and holds it toward the camera.

Respondent was indicted on two counts each of Promoting an Obscene Sexual Performance by a Child (Penal Law §263.10) and Promoting a Sexual Performance by a Child (Penal Law §263.15). He moved to dismiss the indictment, arguing that Section 263.15 is overbroad in that it prohibits promotion of nonobscene materials, which are protected by the First Amendment. Respondent's motion to dismiss the indictment was denied in an opinion by Justice Irving Lang of the New York Supreme Court. 96 Misc.2d 669, 409 N.Y.S. 2d 632 (App. C, *infra*). After the trial, at which the two films were exhibited to the jury, respondent was acquitted of the two counts of Promoting an Obscene Sexual Performance by a Child (Penal Law §263.10) but found guilty of the two counts of Promoting a Sexual Performance by a Child, which did not require proof that the films were obscene (Penal Law §263.15).

Respondent's conviction was affirmed without opinion by the Appellate Division of the New York State Supreme Court. 74 A.D.2d 558, 424 N.Y.S.2d 967 (App. B, *infra*).

On appeal to the New York Court of Appeals, respondent again argued that Section 263.15 is overbroad because it makes criminal the promotion of material which is not obscene. Holding that Section 263.15 violated the First Amendment, the New York Court of Appeals reversed and dismissed the indictment.

The Judgment Below

At the outset of its per curiam opinion, the New York Court of Appeals stated that, although it would ordinarily "interpret a statute so as to avoid constitutional infirmities, if at all possible" (App. A, at 3a), it could not read Section 263.15 in a limited way. More specifically, the court found it impossible "to save Section 263.15 by limiting its application to those who promote obscene performances" (App. A, at 3a). That limiting construction was not possible because another section, Section 263.10, makes it a crime to promote an obscene sexual performance by a child; thus, there was no doubt that the Legislature intended that Section 263.15 encompass sexual conduct by a child in performances which are not obscene (App. A, at 4a). This refusal to consider any other limiting construction makes it clear that the New York Court of Appeals, accepting the argument of respondent (*see* Appellant's Brief in the Court of Appeals, pp. 15-26), reached the conclusion that the First Amendment precludes a state from prohibiting the promotion of a performance in which a child engages in sexual conduct unless the performance is obscene.

The court went on to hold as well that even if the state's interest in protecting children from sexual abuse through exploitation by commercial interests were sufficiently com-

pelling to justify a prohibition on the dissemination even of performances which are not obscene, the New York statute is still inconsistent with the First Amendment. This was so because the legislation is "strikingly underinclusive," in that it prohibits promotion of sexual performances but does not bar the promotion of films, books or plays the production of which involves a child's performance of a dangerous stunt or his participation in any of the other numerous activities which the Legislature has determined are dangerous to the health or well-being of child employees or employees generally (App. A, at 5a-6a). According to the court, "the statute discriminates against films and other visual portrayals of nonobscene adolescent sex solely on the basis of their content" (App. A, at 6a), and it cannot be sustained because no justification is shown for protecting children from sexual abuse and not all other possible dangers (*id.*).[1]

Combining the two rationales for its decision at the conclusion of the majority opinion, the court summed up its holding:

> We merely hold that those who present plays, films and books portraying adolescents cannot be singled out for punishment simply because they deal with adolescent sex in a realistic but nonobscene manner (App. A, at 6a).

In dissent, Judge Jasen, joined by Judge Gabrielli, emphasized that the Legislature was primarily concerned

1. The court also mentioned that there was a question whether, to deter those who might exploit children in New York, the state has the power to punish the promotion in New York of materials which were produced elsewhere. The court, however, did not decide this question (App. A, at 5a).

not with the morality of those who view the child's sexual performance but with the effect of the sexual conduct on the children who were made to engage in that conduct (App. A, at 8a-9a). Judge Jasen pointed out that Section 263.15 does not purport to limit what may be said or what ideas may be expressed about childhood sexuality, but limits only the manner in which such ideas may be expressed (App. A, at 11a). In the dissenters' view, as well as that of the trial judge and apparently all five justices of the Appellate Division, this limited restriction on expression is justified by the state's compelling interest in preventing the sexual abuse and exploitation of the children (App. A, at 11a-14a). To the majority's conclusion that the statute is underinclusive, the dissenters replied that the Legislature was not required to prohibit all products of unlawful conduct involving children in order to prohibit the most serious. According to the dissenters, the distinction drawn by the Legislature is justified by the danger of severe psychological and emotional injury to children who are exploited by being made to engage in sexual conduct to satisfy the market for child pornography (App. A, at 15a).

Reasons for Granting the Writ

1) The New York State Legislature and the legislatures of nineteen other states have sought to combat the problem of child abuse by prohibiting dissemination of material depicting children engaged in sexual conduct regardless of whether the material is obscene.[2] In New York, Penal Law

2. Ariz. Rev. Stat. Ann. §13-3553; Colo. Rev. Stat. §18-6-403 (3)(b); Del. Code Ann. tit. 11, §§1108, 1109; Hawaii Rev. Stat. §707-751; Ky. Rev. Stat. §§531.320, 531.340-531.360; La. Rev. Stat. Ann. §14:81.1(A)(3); Me. Rev. Stat. Ann. tit. 17, §2923(1); Mass.

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Section 263.15 makes it a crime to sell films or photographs, or to produce live performances, which include sexual conduct by a child, even though the film, photograph or performance is not obscene. In this case, the New York Court of Appeals determined that Section 263.15 is unconstitutional because it makes criminal the dissemination of nonobscene films, photographs or plays.

The compelling reasons which prompted the Legislature to enact Article 263 of the Penal Law are set forth in Chapter 910 of the Laws of New York 1977, Section 1:

> The legislature finds that there has been a proliferation of exploitation of children as subjects in sexual performances. The care of children is a sacred trust and should not be abused by those who seek to profit through a commercial network based upon the exploitation of children. The public policy of the state demands the protection of children from exploitation through sexual performances. . . .

As noted by Judge Jasen in his dissent below, the statute is based on the premise that the commercial traffic in child pornography encourages the sexual abuse of children by making it profitable, and that such abuse may most effectively be prevented, not merely by prohibiting the abuse directly, but by cutting short the traffic in its product (App. A, at 9a, 13a).

The reason for prohibiting the dissemination of both nonobscene and obscene materials depicting children en-

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Ann. Laws ch. 272, §29A; Mich. Comp. Laws Ann. §750.145c (3); Miss. Code Ann. §97-5-33(4); Mont. Rev. Codes Ann. §45-5-625; N.J. Stat. Ann. §2C:24-4(5); Okla. Stat. Ann. tit. 21, §1021.2; Pa. Cons. Stat. Ann. §6312(c); R.I. Gen. Laws §11-9-1.1; S.D. Codified Laws Ann. §22-22-24; Tex. Penal Code Ann. tit. 9, §43.25(e) (Vernon); W. Va. Code § 61-8C-3; Wis. Stat. Ann. §940.203(4) (West).

gaged in sexual conduct is that the production of such materials is exploitative and damaging to the children involved, even if the product happens not to be obscene in the legal sense. For example, a twelve-year-old girl who is filmed committing fellatio while nude has been abused, regardless of whether that conduct is included in a movie which, when taken as a whole, proves not to be obscene. As was pointed out by a sponsor of New York's statute, "It is irrelevant to the child whether or not the material is obscene or has a literary, artistic, political or social value." Assemblyman Howard L. Lasher, Memorandum in Support of Assembly Bill A. 3587-B, p. 2 (*see* App. C, at 27a).

Indeed, given the statutory purpose of protecting children from exploitation by their use in the production of materials which show them in sexual conduct, it would have been incongruous for the Legislature to prohibit only the dissemination of obscene materials, since the elements of obscenity—prurient appeal, patent offensiveness and lack of serious value—all pertain to the content of the material and not to the circumstances of its production. *See* Pope, *Child Pornography: A New Role for the Obscenity Doctrine,* 1978 Ill. L. F. 711, 745. It would be equally inconsistent with that statutory purpose to permit purveyors of child pornography to defend against a charge of promoting a sexual performance by a child, by showing that the performance at issue is not obscene, however sexually exploitative it might be.

Moreover, in designing a statute to protect children from sexual abuse, the Legislature recognized that as a practical matter, it is often difficult to prove obscenity.

The concept of obscenity is complex to begin with, and its application to particular cases is "a matter of considerable delicacy," *United States* v. *Various Articles of Obscene Merchandise*, 600 F.2d 394, 402 (2d Cir. 1979), resting on often highly elusive community standards. Indeed, defense counsel have argued successfully that even though the materials at issue in a particular case are disgusting, they simply do not appeal to the prurient interest in sex, or are not patently offensive by community standards. Further, to satisfy the element of obscenity, the work in question must be examined as a whole, *see Miller* v. *California*, 413 U.S. 15, 24 (1973); N.Y. Penal Law §235.00 (1)(c), and defense counsel may succeed in persuading a jury that despite one or two scenes of a child engaged in sexual conduct, a work has serious value when considered as a whole.

In sum, an obscenity requirement would substantially diminish the effectiveness of the legislation as a means of preventing sexual abuse of children. For that reason, the New York Legislature determined not to require proof of obscenity in prosecutions under Section 263.15. In contrast, the Congress decided to include an obscenity requirement in the analogous federal statute. 18 U.S.C. §2252(a). That decision was based, in part, on an opinion by the Justice Department that virtually all child pornography would be obscene. S. Rep. No. 95-438, 95th Cong., 2d Sess. 12-14, 17-18 (1978), *reprinted in* [1978] U.S. Code Cong. & Ad. News 40, 49-52, 55; H.R. Rep. No. 95-696, 95th Cong., 1st Sess. 7 (1977). However, this opinion fails to take account of the problems inherent in any obscenity prosecution. As shown above, the prosecutorial reality is that an obscenity requirement renders convictions more difficult, thereby impeding the legislative purpose of protecting chil-

dren from sexual abuse. In addition, the Congress was influenced by the inability of the Justice Department to say with "any certainty" that legislation without an obscenity requirement "would withstand constitutional challenge." Sexual Exploitation of Children: Hearings Before the Subcomm. on Crime of the House Comm. on the Judiciary, 95th Cong., 1st Sess. 137 (1977); S. Rep. No. 95-438, *supra* at 49-52, 55; H.R. Rep. No. 95-696, *supra* at 7. This concern, however, is hardly a substitute for a determination by this Court of the constitutionality of a state statute which omits an obscenity requirement in order to afford maximum protection to children from sexual abuse by commercial interests.

The wisdom of the New York Legislature's approach is, in fact, shown clearly in the instant case. Respondent was acquitted of selling an obscene film, and yet the production of his films, devoted to nothing but children masturbating, was manifestly an instance of sexual abuse. In holding Section 263.15 unconstitutional, under what it believed to be the constraint of the Federal Constitution, the New York Court of Appeals has crippled the ability of law enforcement and the judicial system to deal with the substantial and ever-increasing commercial sexual exploitation of children who are made to engage in sexual conduct for the profit of the producers and purveyors of child pornography.[3]

3. The scope of the problem of child pornography was exhaustively delineated in the congressional hearings held from May to September 1977, before enactment of the federal child pornography statute, 18 U.S.C. §2251 *et seq.* *See* Sexual Exploitation of Children, Hearings Before the Subcomm. on Crime of the House Comm. on the Judiciary, 95th Cong., 1st Sess. (1977) (hereinafter cited as Sexual Exploitation of Children I); Protection of Children Against Sexual Exploitation, Hearings Before the Subcomm. to Investigate Juvenile Delinquency of the Senate Comm. on the Judiciary, 95th Cong., 1st

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Sess. (1977) (hereinafter cited as Protection of Children Against Sexual Exploitation); Sexual Exploitation of Children, Hearings Before the Subcomm. on Select Education of the House Comm. on Education and Labor, 95th Cong., 1st Sess. (1977) (hereinafter cited as Sexual Exploitation of Children II). *See especially* Sexual Exploitation of Children I, *supra* at 41-45 (statement of Judianne Densen-Gerber, J.D., M.D., President, Odyssey Institute), 57-61, 68-71 (statement of Investigator Lloyd H. Martin, Los Angeles Police Department), 109-13 (statement of Michael Sneed, Reporter, *Chicago Tribune*), 331-32 (statement of Robin Lloyd); Protection of Children Against Sexual Exploitation, *supra* at 11-16 (statement of Sergeant Ronald Kelly, Chicago Police Department), 18-20 (statement of "Marty," child prostitute and subject in child pornography), 23-28 (statement of Guy Strait, producer of child pornography), 35-43 (statement of Gerald S. Richards, producer of child pornography); Sexual Exploitation of Children II, *supra* at 43-45 (statement of Investigator Martin), 220 (statement of then Congressman Edward I. Koch), 249-51 (statement of the Reverend Bruce Ritter, Director, Covenant House, New York City, 264-65 (statement of Dr. Densen-Gerber).

A growing awareness of the problem was extensively reflected in the news media beginning in 1977. *See, e.g.,* Sneed, Bliss, Moseley, *et al., Child Pornography: Sickness for Sale,* series of articles in *Chicago Tribune,* May 15-17, 1977, *reprinted in* Sexual Exploitation of Children I, *supra* at 428-42 *and in* Protection of Children Against Sexual Exploitation, *supra* at 131-50; *Kiddie Porn,* 60 Minutes, vol. IX, No. 33, May 15, 1977, *reprinted in* Protection of Children Against Sexual Exploitation, *supra* at 123-30; *Child Pornography: Outrage Starts to Stir Some Action,* U.S. News and World Report, June 13, 1977, p. 66; *Child's Garden of Perversity,* Time, April 4, 1977, p. 55, *reprinted in* Sexual Exploitation of Children I, *supra* at 423; Ditkoff, *Child Pornography,* American Humane, April 1978, pp. 29-32; Anson, *The Last Porno Show,* 8 New Times 46 (1977), *reprinted in* Protection of Children Against Sexual Exploitation, *supra* at 150-58. *See also* Campbell, *Help Sought for Children Used in Pornography, New York Times,* Jan. 14, 1977, Pt. II, p. 3, col. 1 (magazines entitled "Lollitots," "Moppets," "Brat" and "Tots" depicting children ages three to sixteen in lewd and suggestive poses sold in pornographic bookstores in Times Square); Ivins, *Eight Held as Principles in Smut Production, New York Times,* April 27, 1977, p. 1, col. 6 (4,000 copies of pornographic "peep-show" films depicting children eight to twelve years old seized in two raids in Manhattan); Sexual Exploitation of Children I, *supra* at 41 (statement of Dr. Densen-Gerber); Sexual Exploitation of Children II, *supra* at 220 (statement of Congressman Koch), 249-51 (statement of Bruce Ritter). *See also* R. Lloyd, *For Money or Love: Boy Prostitution in America* (1976); Guio, Burgess and Kelly, *Child Victimization: Pornography and Prostitution,* 3 J. of Crime and Justice 65 (1980); Burgess, Groth and McCausland, *Child Sex Initiation Rings,* 51 Am. J. Orthopsych. 110 (1981).

Of course, we recognize that no matter how serious the evil of the sexual abuse of children for profit and no matter how reasonable the legislative response to that evil, certiorari would not be called for if the majority below was unquestionably correct in its legal determination. That determination, however, as we will now show, raises substantial questions which warrant review by this Court.

2) The Court of Appeals decision permits the state to prosecute the dissemination of child pornography only if the pornography is legally obscene, despite the irrelevance of obscenity to the harm at which Section 263.15 is directed. To be sure, the majority opinion expressly acknowledges that the state's "legitimate interest in protecting the welfare of minors within its borders . . . may transcend first amendment concerns" (App. A, at 4a-5a). Nonetheless, the majority seemingly concludes that Section 263.15 is unconstitutional simply because it prohibits the promotion of materials which, because they are not obscene, "are traditionally entitled to constitutional protection from government interference under the First Amendment" (App. A, at 3a). The opinion then goes on, however, to make the quite different argument, seemingly in the alternative, that even if the Legislature is empowered to protect children by prohibiting dissemination of materials portraying children engaged in sex without regard to obscenity, Section 263.15 is unconstitutionally "underinclusive" because it does not prohibit the dissemination of materials portraying children engaged in other, non-sexual, types of harmful conduct (App. A, at 5a-6a).

On either rationale, the court's decision presents for review a substantial question concerning the balance to be

struck between the state's interest in protecting children from sexual abuse, and the free-speech interest, if any, in disseminating films or photographs or producing plays which show children engaged in such conduct as sexual intercourse, sodomy, masturbation or lewd exhibition of the genitals. This Court, in determining the scope of first amendment protection, has recognized the state's legitimate, indeed compelling, interest in safeguarding its children from abuses which might prevent their "growth into free and independent well-developed men and citizens." *Ginsberg* v. *New York*, 390 U.S. 629, 640-41 (1968), quoting *Prince* v. *Massachusetts*, 321 U.S. 158, 165 (1944). This case presents the significant question whether nonobscene materials showing children engaged in sexual conduct are protected by the First Amendment, or whether the state may legitimately proscribe such materials in order to prevent the sexual abuse necessarily involved in their production.

As the New York court acknowledged, the state interest in protecting children does at times transcend first amendment concerns. Thus, for example, in *Ginsberg*, not cited by the court below, this state interest was held to justify the New York Legislature's determination to prohibit the dissemination to minors of "girlie" magazines even though their dissemination to adults could not be prohibited, on the grounds that such materials are harmful to minors. This Court found that the interest in protecting minors prevailed over any free-speech interest in buying and selling the magazines at issue, so long as the Legislature could rationally find that such magazines are harmful to minors. Moreover, this Court held that the Legislature's finding that the material is harmful need not be based upon accepted

scientific fact; it was sufficient that the harmfulness of the materials had not been scientifically disproved. 390 U.S. at 641-43.

To be sure, the statute at issue in *Ginsberg* prohibited only dissemination to children, while Section 263.15 prohibits the dissemination of the prohibited materials to adults. Nevertheless, if the state is entitled to promote "the ethical and moral development" of children, *Ginsberg* v. *New York*, 390 U.S. at 641, by preventing them from reading "girlie" magazines, there is certainly a serious question whether the state may be denied the power to prevent the actual sexual abuse of children by prohibiting altogether the dissemination of the products of that abuse. The effects of using children in the production of pornography have not yet been extensively studied, due to the recency of the problem as a major social issue. Nevertheless, there is scientific support for the conclusion that such use is harmful,[4] and as in *Ginsberg*, it is significant

4. Schoettle, *Child Exploitation: A Study of Child Pornography*, 19 J. Am. Acad. Child Psych. 289 (1980). Schoettle suggests that the effects of using children to produce pornography resemble those of incest, *id.* at 296-97, and there is wide agreement that incest can bring about substantially harmful effects, such as guilt, depression, feelings of worthlessness and psychologically induced somatic disorders. *See, e.g.*, Summit and Kryso, *Sexual Abuse of Children: A Clinical Spectrum*, 48 Am. J. Orthopsych. 237 (1978); Lewis and Sarrel, *Some Psychological Aspects of Seduction, Incest and Rape in Childhood*, 8 J. Am. Acad. Child Psych. 606 (1969); D. Finkelhor, *Sexually Victimized Children*, 31-32, 97-108, 185-214 (1979); R. Kempe and C. Kempe, *Child Abuse* 54-56 (1978). In addition to these psychological effects, there is evidence linking incest with specific pathological behaviors such as prostitution, James and Meyerding, *Early Sexual Experience As a Factor in Prostitution*, 7 Archives of Sexual Behavior 31 (1978); Sexual Exploitation of Children II, *supra* note 3 at 135 (statement of Henry Giarretto, Director, Santa Clara County Child Sexual Abuse Treatment Pro-

(footnote continued on next page)

that the harmfulness of such use has by no means been scientifically disproved. Moreover, as emphasized in the congressional hearings, child pornography is produced secretly. Thus, there are compelling reasons to attack the commercial sexual exploitation of children by banning traffic in the products of that exploitation.[5] Therefore, it was quite rational for the New York Legislature to find that the use of children as subjects in sexual performances is a form of sexual abuse and to proscribe the dissemination of such performances, without regard to their obscenity, as a means of preventing that abuse.

Given this rational basis for the Legislature's decision to prohibit the promotion of child pornography, a substantial question is also raised by the second ground for the New York Court of Appeals decision, that the statute is unconstitutionally "underinclusive." In reaching this conclusion, the court below relied solely on *Erznoznik* v. *City of Jacksonville*, 422 U.S. 205 (1975), but that case is inapposite. In *Erznoznik*, a Jacksonville city ordinance made it unlawful for a drive-in theatre to exhibit movies containing nude

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gram), drug abuse, Benward and Densen-Gerber, *Incest As a Causative Factor in Anti-Social Behavior: An Exploratory Study*, 4 Contemp. Drug Prob. 322 (1975), and abuse of the victim's own children. Summit and Kryso, *supra* at 248. *See generally* K. Meiselman, *Incest: A Psychological Study of Causes and Effects with Treatment Recommendations* 194-261 (1978). To the extent that the use of a child in the production of pornography resembles incest, it may be expected to have the same pathological results.

5. Sexual Exploitation of Children I, *supra* note 3 at 11 (statement of Frank Osanka, Professor of Social Justice and Sociology and specialist in child abuse and neglect), 34 (statement of Charles Rembar), 69 (statement of Investigator Martin), 142 (statement of Assistant Attorney General John C. Keeney), 162 (statement of then Congressman John M. Murphy); Sexual Exploitation of Children II, *supra* note 3, at 118-19 (statement of Robin Lloyd), 254 (statement of Bruce Ritter), 272-73 (statement of Charles Rembar).

scenes if such movies could be seen from a public place. During oral argument, counsel for the city argued that the purpose of the ordinance was to permit the smooth flow of traffic. In observing that the ordinance was underinclusive, this Court pointed out that the ordinance singled out one form of protected speech (movies with nudity) but failed to regulate other protected speech (other movies, *e.g.*, ones containing violence) which created the same danger to traffic. Thus, it appeared that the ordinance was designed to censor content rather than facilitate the flow of traffic.

Here, however, as shown above, special concerns about children justify the statutory classification. Surely, as noted by the dissent below, the New York Legislature could reasonably conclude that other types of harm to children that might result from their participation in illegal performances, *e.g.*, injury from dangerous stunts, are not threats of the same type or of the same magnitude as those involved in sexual abuse. Moreover, there is no evidence to suggest that such stunts or other kinds of dangerous employment are not effectively dealt with by the direct prohibition of the use of children in such circumstances. In contrast, there is ample support for the Legislature's conclusion that it is difficult, if not impossible, to deal with the problem of sexual abuse of children by merely prohibiting the use of children as subjects in sexual performances. *See* authorities collected in note 5, *supra*.

Moreover, as noted, this Court has recognized that a legislature may deal with one part of a problem at a time. *See, e.g., Williamson* v. *Lee Optical Co.*, 348 U.S. 483, 488-89 (1955). And even though the classification here involves

a form of expression, there has been no attempt, as in *Erznoznik*, to censor expression because of its message, idea, subject matter or content. Rather, the purpose here is to protect children from sexual abuse; and whether that is a sufficient basis for the classification, given the sexual abuse involved in the production of child pornography, presents a significant constitutional question.

Finally, the issues presented here are narrow. The New York Court of Appeals believed that no limiting construction consistent with the First Amendment can be placed on Section 263.15, and held that any prohibition of the dissemination of nonobscene materials which depict sexual conduct by children is impermissible. If this Court rules that the Constitution does not afford such blanket protection, and that the dissemination of such nonobscene materials can in some defined circumstances be prohibited, then it will be left to the Court of Appeals on remand to determine whether Section 263.15 can be construed so as to prohibit the promotion of nonobscene materials only under those proper circumstances.

Equally narrow is the question whether Section 263.15 is unconstitutionally underinclusive. This issue too turns on the scope of protection afforded nonobscene materials which include sexual conduct by a child, and also on the state's power to regulate the promotion of such material while not regulating the dissemination of material containing other, non-sexual, types of prohibited conduct by children.

* * *

In sum, substantial evil flows from filming, photographing, or producing live performances of children who are

made to engage in sexual conduct. Whether, to prevent that evil, the state is justified in prohibiting the production and sale of such films, photographs or live performances is a question which calls for definitive resolution by this Court.

Conclusion

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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July 11, 1981

APPENDIX A

Opinion and Order of the New York State Court of Appeals

STATE OF NEW YORK

COURT OF APPEALS

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent,

v

PAUL IRA FERBER,

Appellant.

Herald Price Fahringer, Paul J. Cambria, Jr., and *Barbara Davies Eberl* for appellant.

Robert M. Morgenthau, District Attorney (*Donald J. Siewert* and *Robert M. Pitler* of counsel) for respondent.

Per Curiam.

Based on the sale of two films to an undercover New York City police officer, defendant was indicted on two counts of promoting an obscene sexual performance by a child (Penal Law, § 263.10) and two counts of promoting a sexual performance by a child (Penal Law, § 263.15). Prior to trial he moved to dismiss the charges on the ground,

among others, that the latter statute (Penal Law, § 263.15) was unconstitutional. The motion was denied. A jury subsequently acquitted the defendant of the obscenity charges, but found him guilty of both counts of promoting a sexual performance by a child.

The Appellate Division affirmed the conviction, without opinion. The defendant appeals. The primary question is whether section 263.15 of the Penal Law on its face infringes rights guaranteed by the First Amendment.[1]

At the outset we note that where First Amendment rights are in issue, a party generally has standing to challenge a statute on its face, that is, as applied to other cases (*Broadrick v Oklahoma*, 413 US 601, 611). Although this type of broad attack is more limited when the statute regulates or proscribes conduct as opposed to "pure speech" (*ibid.*, at p 614-615), the statute at issue here is clearly aimed at books, films and other traditional forms of expression (see Penal Law § 263.00, subd 4) as is evident from the defendant's indictment and conviction.

Section 263.15 of the Penal Law is part of a statutory scheme enacted in 1977. The stated purpose is to protect children from exploitation in sexual performances (L. 1977, ch 910, § 1). The use of a child less than 16 years of age in a sexual performance is prohibited by section 263.05 of the Penal Law. Those who promote such performances are also subject to prosecution. Section 263.10 of the Penal Law makes it a class D felony to promote an obscene sexual performance involving a child. Section 263.15 of the Penal

1. A Federal court found the statute unconstitutional in *St. Martin's Press v Carey* (440 F Supp 1196). Although that judgment was set aside on appeal on the ground that there was an insufficient likelihood of prosecution (605 F2d 41), that cannot be said in this case.

Law provides a similar penalty for promoting any sexual performance by a child.[2]

It is evident from the statutory scheme that the statute at issue in this case (Penal Law, § 263.15) is not directed at obscene performances which, as noted, are proscribed by the preceding section (Penal Law, § 263.10). In fact if section 263.15 serves any independent purpose, its goal must be to prohibit nonobscene sexual performances involving children. Thus on its face the statute would prohibit the showing of any play or movie in which a child portrays a defined sexual act, real or simulated, in a nonobscene manner. It would also prohibit the sale, showing, or distributing of medical or educational materials containing photographs of such acts. Indeed, by its terms, the statute would prohibit those who oppose such portrayals from providing illustrations of what they oppose. In short, the statute would in many, if not all, cases prohibit the promotion of materials which are traditionally entitled to constitutional protection from government interference under the First Amendment.

A court should, of course, interpret a statute so as to avoid constitutional infirmities, if at all possible (see, e.g., *Matter of Lorie C.*, 49 NY2d 161, 171). In this case, however, it is not possible to save section 263.15 by limiting its application to those who promote obscene performances.

2. Section 263.15 of the Penal Law states: "A person is guilty of promoting a sexual performance by a child when, knowing the character and content thereof, he produces, directs or promotes any performance which includes sexual conduct by a child less than sixteen years of age." The definitions provided in section 263.00 of the Penal Law indicate that "sexual conduct" includes specified acts real or simulated (subd 3), and that a performance includes any play, motion picture, photograph, dance and "any other visual representation exhibited before an audience" (subd 4).

The fact that such activity is already proscribed by section 263.10 indicates that the Legislature did not intend the statute now before us to be similarly limited in its application. To read the two statutes as covering the exact same activity would, in any event, effectively invalidate section 263.15 by rendering it meaningless.

Nevertheless, the District Attorney urges that "the issue here is not one of censorship. Rather, promotion of these materials is prohibited in order to protect the children from the sexual exploitation necessarily involved in the production of such materials." In other words the purpose of the statute is not to protect the audience from viewing offensive materials, but to protect the performers from being exploited by removing the commercial incentive for such productions. Given that objective it is urged that any question as to whether the material is obscene is not determinative because the Legislature could reasonably conclude that the effect on a child is no less damaging when the finished product happens not to be obscene.

By the same token the effect on freedom of expression is the same whether the government bluntly seeks to censor what it finds offensive, or more benignly acts to protect the health and welfare of the performers. Thus no matter what the government's objective, First Amendment standards remain applicable whenever the effect of a government regulation is to curtail protected modes of expression (see, e.g., *People v Remeny*, 40 NY2d 527). However, as the District Attorney notes, First Amendment rights are not absolute and may on occasion be outweighed by superior governmental interests.

The State has a legitimate interest in protecting the welfare of minors within its borders, and, at times, that inter-

est may transcend First Amendment concerns (see, e.g., *Prince v Massachusetts*, 321 US 158). The statute at issue in this case would go further, if as the District Attorney urges it is designed to protect children employed in the making of plays, films and books. With respect to recorded performances or photographs the statute draws no distinction between those made in this State and those made elsewhere. Anyone who promotes such materials would be subject to prosecution even though the act recorded may have occurred in another State or country where such conduct may not be prohibited. It applies equally to a live performance of a Broadway play and a filmed report of New Guinea fertility rites. Indeed in this case defendant's conviction did not rest on any contention that the film was made in this State.[3] To the extent the statute would purport to regulate the sexual performances of children throughout the world there is some question as to whether that goal, however commendable, necessarily comes within the police powers of the State of New York.

Equally troublesome is the means adopted by the State to accomplish its purpose. The State contends, in essence, that it may prohibit the sale, showing, distribution, or other promotion of any film, or other visual materials, whenever the making of the film necessarily involved a violation of some other law designed to protect the performers, at least youthful performers, from a danger to their health and well-being. Assuming, without deciding, that the Legislature generally has the power to do this consistent with the First Amendment, the fact remains that it has not done so uniformly in this State. Section 263.15 does not prohibit the knowing sale or promotion of any film, or other item,

3. Neither was there any contention that the film was made after the statute went into effect.

in which a child has performed a dangerous stunt or where production required a child to engage in any of the numerous activities which the Legislature in the exercise of its police power has determined is [*sic*] dangerous to the health or well-being of child employees or employees generally (see, e.g., Penal Law § 260.10, subd 7; Labor Law, § 130 *et seq.;* Education Law, § 3215 *et seq.;* § 3228 *et seq.;* cf. Penal Law, § 245.05, subds 2, 3). The severe penalties imposed by section 263.15 of the Penal Law are reserved for those who promote plays, films, books and photographs, dealing with adolescent sex in a nonobscene manner. Thus to the extent that section 263.15 is designed to protect child employees from engaging in acts which the Legislature has found to be dangerous to their well-being the statute is "strikingly underinclusive" (*Erznoznik v City of Jacksonville,* 422 US 205, 214). In short, the statute discriminates against films and other visual portrayals of nonobscene adolescent sex solely on the basis of their content, and since no justification has been shown for the distinction other than special legislative distaste for this type of portrayal, the statute cannot be sustained (*Erznoznik v City of Jacksonville, supra,* at p 215).

In conclusion it is important to emphasize that the statute considered in this case (Penal Law, § 263.15) does not deal with child pornography. Those who employ children in obscene plays, films and books, are still subject to prosecution as are those who sell or promote such materials (see Penal Law, §§ 263.05, 263.10). We merely hold that those who present plays, films, and books portraying adolescents cannot be singled out for punishment simply because they deal with adolescent sex in a realistic but nonobscene manner.

Accordingly, the order of the Appellate Division should be reversed and the indictment dismissed.

JASEN, J. (dissenting). The majority today holds that the State of New York is without power to prohibit the dissemination of films depicting children of tender years engaging in actual or simulated sexual intercourse, sodomy, sexual bestiality, masturbation, sado-masochistic abuse or lewd exhibition of the genitals unless the child's "performance" is determined to be legally obscene. The majority has apparently taken the view that the State's interest in preventing the severe emotional and psychological damage to our children which will result from this base and degrading sexual exploitation is outweighed by the First Amendment right of "expression" of those who promote the distribution of such sexually exploitative material. I cannot agree.

In recent years, there has been a growing public awareness of the increased use of young children in pornographic and sexually exploitive material.[1] Outraged by this abuse

1. The subject has received much attention in the media. ("60 Minutes", Vol IX, No. 33, a broadcast on the CBS Television Network entitled "Kiddie Porn", May 15, 1977, as reprinted in Protection of Children Against Sexual Exploitation, Hearings before the Subcomm to Investigate Juvenile Delinquency of the Senate Comm on the Judiciary, 95th Cong, 1st Sess, at p 123; *Chicago Tribune* [a series of articles], May 15, 1977, at p 1, col 1; May 16, 1977, at p 1, col 1; May 17, 1977, at p 1, col 1, reprinted in Sexual Exploitation of Children, Hearings Before the Subcomm on Crime of the House Comm on the Judiciary, 95th Cong, 1st Sess, at pp 428-442; Child's Garden of Perversity, *Time*, April 4, 1977, at p 55; see Protection of Children From Use in Pornography: Toward Constitutional and Enforceable Legislation, 12 U of Mich J of L Reform 295.) I note also that the characterization of such material as "pornographic" does not necessarily imply that it is "legally obscene". While it is fair to say that most obscene material is pornographic, the converse is not necessarily true, for a given performance's "obscenity" in a legal sense depends upon the standards of the community in which it finds itself.

of our children, the Legislature enacted section 263.15 of the Penal Law, among others, to eliminate this exploitation of our children and to curb this burgeoning industry.[2] The statute states: "A person is guilty of promoting a sexual performance by a child when, knowing the character and content thereof, he produces, directs or promotes any performance which includes sexual conduct by a child less than sixteen years of age." Another statute defines "sexual conduct" as "actual or simulated sexual intercourse, deviate sexual intercourse, sexual bestiality, masturbation, sado-masochistic abuse, or lewd exhibition of the genitals" and defines "performance" as any "play, motion picture, photograph or dance" or "any other visual representation exhibited before an audience." (Penal Law, § 263.00, subds 3, 4.) Section 263.15 makes illegal the dissemination, sale or other "promotion" of such sexual "performances" by children whether the performance is obscene or not.

Unlike an obscenity statute, section 263.15 is not concerned with the effect of this sexually exploitive material upon the community. Instead, it is primarily concerned with the effect which the depicted conduct has on the chil-

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2. One researcher, Robin Lloyd, in his book For Love or Money: Boy Prostitution in America, has documented the existence of over 260 so-called "boy" and "girl" magazines, with titles such as "Torrid Tots", "Night Boys", "Lolita", "Boys Who Love Boys", and "Children Love". (Lloyd, For Love or Money: Boy Prostitution in America, at p 226; see Senate Comm on the Judiciary, Protection of Children Against Sexual Exploitation Act of 1977, S Rep No. 95-438, 95th Cong, 1st Sess, at pp 5-6; see, also, Free Speech and Self-Incrimination: The Constitutionality of California's New Child Pornography Laws, 10 Pacific L J 119.)

dren involved.[3] It seeks to inhibit the maintenance of a market which fills the commercial coffers of those who sexually abuse and commercially exploit our children and prohibits conduct—the promotion of sexual performances—which effectively maintains that market.

While it may be conceded that this statute acts to limit the First Amendment rights of promoters of such sexually exploitive material, in my view, this narrow infringement upon the freedom of expression of purveyors of such material is amply justified by the compelling interest of the State in preventing a practice which encourages and, indeed, financially underwrites the sexual abuse and exploitation of our children.

It has long been recognized by the Supreme Court of the United States that the right to freedom of expression embodied in the First Amendment to the Constitution is not absolute. Restraints upon the mode of expression (*United States v O'Brien*, 391 US 367), the time, place and manner of expression (*Adderly v Florida*, 385 US 39; *Cox v Louisiana*, 379 US 559; *Kovacs v Cooper*, 336 US 77) and indeed, even on the substantive content of the expression

3. The Legislature set forth its intent in section 1 of chapter 910 of the Laws of 1977, as follows:

"Section 1. Legislative declaration. The legislature finds that there has been a proliferation of exploitation of children as subjects in sexual performances. The care of children is a sacred trust and should not be abused by those who seek to profit through a commercial network based upon the exploitation of children. The public policy of the state demands the protection of children from exploitation through sexual performances.

"The legislature further finds that the sale of these movies, magazines and photographs depicting the sexual conduct of children to be so abhorrent to the fabric of our society that it urges law enforcement officers to aggressively seek out and prosecute both the peddlers of children and the promoters of this filth by vigorously applying the sanctions contained in this act."

itself (see, *e.g.*, *Roth v United States*, 354 US 476; *Chaplinsky v New Hampshire*, 315 US 568; *Schenck v United States*, 249 US 47), have been found to be constitutionally permissible in certain circumstances. The governmental interest which must be shown to justify a particular restraint varies according to the type of restraint imposed.

Time, place or manner restrictions, for example, may be justified upon a showing that such regulations serve a "significant governmental interest and leave ample alternative channels for communication." (*Consolidated Edison v Public Serv. Comm.*, 447 US 530, 535.) Restrictions upon the mode of expression, on the other hand, are subject to a slightly different standard. Where expressive conduct contains both "speech" and "non-speech" elements, the governmental interest in the regulation of the "non-speech" component of the conduct can justify incidental limitations on the actor's freedom of speech. The governmental interest required for this sort of modal limitation is a "substantial governmental interest" which is "unrelated to the suppression of free expression." (*United States v O'Brien*, 391 US 367, 376-377, *supra*.) The strictest standard is applied to content-based restrictions. (*First Nat. Bank of Boston v Bellotti*, 435 US 765, 786.) Where such restrictions are placed upon the speech of private persons, "the state action may be sustained only if the government can show that the regulation is a precisely drawn means of serving a compelling state interest." (*Consolidated Edison v Public Serv. Comm.*, 447 US 530, 540, *supra*.) Thus, in order to determine whether a particular restraint is permissible, we must first examine the nature of the restraint and then determine whether a sufficient governmental inter-

est justifying the limitation of freedom of expression has been demonstrated.

The restraint upon freedom of expression imposed by section 263.15 of the Penal Law is quite limited. The statute does not restrict in any manner frank discussion of the issue of teenage sexuality or any other issue. It does not purport to limit what may be said or what ideas may be expressed. Instead, it limits only the mode of expression, by requiring that the bodies of our children not be used in expressing one's ideas, and effectuates this requirement by proscribing the sale of films which depict children of tender years engaging in certain sexual acts.[4]

This limitation on the speaker's mode of expression, as noted earlier, is justified if "it furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest." (*United States v O'Brien*, 391 US 367, 377, *supra;* see, also, *Giboney v Empire Stor. Co.*, 336 US 490.) In my opinion, the People have adequately demonstrated that this standard has been met.

There can be no question that the State's interest in the protection of the psychological and emotional welfare of children is substantial and unrelated to the suppression of free expression. The State's overriding interest in the welfare of children has been recognized in many contexts and is often relied upon by the Legislature to protect children

4. It is noteworthy also that the statute does not prohibit the depiction of nudity per se, even when the body of a child is depicted. Instead, it prohibits only depiction of children engaging in certain sexual acts including lewd exhibition of the genitals.

from their own inexperience or as a basis for denying adults rights which they might otherwise have because the exercise of those rights might cause harm to children. For example, the child labor laws restrict the ability of adults to engage children in certain occupations (Labor Law, §§ 130-133) or to employ them at certain times (Labor Law, §§ 170-173; see, also, Education Law, § 3215 *et seq.*; § 3228 *et seq.*). We limit the applicability of contract law in relation to infants (*Casey v Kastel*, 237 NY 305; Restatement, Contracts 2d, § 18 B) and soften the impact of the criminal law upon them (Penal Law, § 30.00; CPL art 720; Family Ct Act, art 7). The law restricts a child's right to marry (Domestic Relations Law, § 15-a). We restrict a child's ability to drive a car (Vehicle and Traffic Law, § 502, subd 2). All this we do to protect our children. The well-being of children is a subject long recognized as within a State's constitutional power to regulate.

Nor is it a novel proposition that the rights protected by the First Amendment should be restricted when the exercise of those rights might endanger the welfare of a child. In *Prince v Massachusetts* (321 US 158), the United States Supreme Court held that a statute prohibiting use of a child to distribute literature on the street was valid notwithstanding the statute's infringement on First Amendment freedoms. Also, in *Ginsberg v New York* (390 US 629), a proscription against the distribution of nonobscene literature to children was upheld. (See, also, *FCC v Pacifica Foundation*, 438 US 726.) It would seem clear that the State's interest in the prevention of abuse of children in the creation of sexually exploitive literature involving children is at least as compelling as the interest in preventing them from reading it.

It is argued, however, that section 263.15 of the Penal Law cannot achieve that end, for it is not directed at the creators but, rather, at the promoters of such material. I disagree. The creators of such material can only practice their "craft" so long as a market is maintained for their end product. The proscription embodied in section 263.15 is an attempt to prevent the maintenance of such a market. The Legislature has apparently taken the view that no more narrowly drafted statute will achieve an adequate level of protection for our children, and that a proscription of the promotion of such sexually exploitive material involving children is essential.[5] I am persuaded that this conclusion is correct and that the prohibition on promotion of such material causes an incidental restriction on alleged First Amendment freedoms which is no greater than is essential to the furtherance of the State's compelling interest in preventing the use of children in sexually exploitive material.

Moreover, even if I were to agree that section 263.15 is a "content-based" restriction, I would still conclude that the statute is constitutional. The most priceless possessions we have in this Nation are our children. It seems to me that the State's interest in protecting children is so compelling that even a direct restraint would be permissible.

5. The commercial revenue which the promoters of this sexual exploitation of our children derive from their activities is staggering. (Senate Comm on the Judiciary, Protection of Children Against Sexual Exploitation Act of 1977, S Rep No. 95-438, 95th Cong, 1st Sess, at p 6; see, also, Pope, Child Pornography: A New Role for the Obscenity Doctrine, 1978 U of Ill L Forum, 711, 713-716; Comment, Preying on Playgrounds: The Sexploitation of Children in Pornography and Prostitution, 5 Pepperdine L Rev 809, 812-814.) Given the tremendous profit potential inherent in the production of such material, it is quite reasonable to assume that the production of such material will not abate until the market which underwrites it is eradicated.

In my opinion, there is a "clear and present danger" that the promotion of a "sexual performance" by a child will bring about the substantive evil—child abuse—which the Legislature has a right to prevent. (*Schenck* v *United States*, 249 US 47, 52, *supra*.)

Further, I cannot agree with the majority's conclusion that the statute is unconstitutionally overbroad. It is argued that the wording of the statute is so broad that it brings within its proscriptive scope medical and scientific journals, news documentaries and other socially beneficial literature. In my opinion, however, the statute need not be read so broadly. It is aimed at the commercial sexual exploitation of our youth and can be narrowly construed by this court to reach only such sexually exploitive material. Since the statute is subject to a narrowing construction, it should not be struck down as overbroad on its face. As the United States Supreme Court has stated: "[T]he plain import of our cases is, at the very least, that facial overbreadth adjudication is an exception to our traditional rules of practice and that its function, a limited one at the outset, attenuates as the otherwise unprotected behavior that it forbids the State to sanction moves from 'pure speech' toward conduct and that conduct—even if expressive—falls within the scope of otherwise valid criminal laws that reflect legitimate state interests in maintaining comprehensive controls over harmful, constitutionally unprotected conduct. Although such laws, if too broadly worded, may deter protected speech to some unknown extent, there comes a point where that effect—at best a prediction—cannot, with confidence, justify invalidating a statute on its face and so prohibiting a State from enforcing the statute

against conduct that is admittedly within its power to proscribe." (*Broadrick v Oklahoma*, 413 US 601, 615.) It seems to me that the potential for infringement upon legitimate speech inherent in the proscription embodied in section 263.15 of the Penal Law is quite small and can adequately be addressed by this court when the need arises. Hence, I would not hold the statute to be unconstitutionally overbroad.

Nor do I agree that the statute is fatally "underinclusive" as the majority suggests. The Legislature need not prohibit the promotion of all products of illegal child labor in order to prohibit any. (*Erznoznik v City of Jacksonville*, 422 US 205, 215.) While it is true that the presumption of statutory validity has less force where a content-based classification is involved, such a classification can be upheld where "there are clear reasons for the distinctions." (*Id.*) The very real danger of severe psychological and emotional injury which will result from the maintenance of a market for sexually exploitive material involving children is such a "clear reason". Moreover, as I have previously noted, in my opinion the statute does not prohibit the expression of any particular idea or message and is not a content-based restriction.

Finally, the majority suggests, without citation of authority, that the potential extraterritorial effect of the statute somehow renders it invalid.[6] To be sure, there is authority for the proposition that one State may not prohibit

6. I note that defendant did not assert that the statute was invalid due to its extraterritorial effect. Thus, he has failed to preserve this issue and we need not reach it on this appeal. I address this unpreserved issue only because the majority has chosen to premise its reversal in part upon this ground.

a citizen of a sister State from disseminating information about activity which is legal in the sister State. (*Bigelow v Virginia*, 421 US 809, 824-825.) However, this is not the effect of section 263.15 of the Penal Law. Much more than the dissemination of information is involved. The conduct prohibited causes a market for sexually exploitive material involving children to be maintained in New York. The maintenance of this market leaves open the financial conduit by which the production of such material is funded and materially increases the risk that New York children will be injured. In short, the production of such material outside New York for sale here causes harm in New York and is, therefore, subject to the police power of the State of New York at least insofar as that power operates upon the promotion of such material here. (Cf. *Strassheim v Daily*, 221 US 280, 285; *Hyde v United States*, 225 US 347, 362-363; see, also, *Skiriotes v Florida*, 313 US 69, 74-76; *Ford v United States*, 273 US 593, 620-624.)

Accordingly, for all of the above reasons, I would affirm the order of the Appellate Division and uphold the constitutionality of section 263.15 of the Penal Law.

Chief Judge Cooke and Judges Jones, Wachtler, Fuchsberg and Meyer concur in *Per Curiam* opinion; Judge Jasen dissents and votes to affirm in a separate opinion in which Judge Gabrielli concurs.

Order reversed, etc.

APPENDIX B

Order of the Supreme Court— Appellate Division, First Department

At a term of the Appellate Division of the Supreme Court held in and for the First Judicial Department in the County of New York, on February 28, 1980

Present—

Hon. Arnold L. Fein, Justice Presiding
David Ross
Arthur Markewich
Vincent A. Lupiano
Samuel J. Silverman, Justices

The People of the State of New York,

Respondent,

against

Paul Ira Ferber,

Defendant-Appellant.

An appeal having been taken to this Court by the defendant-appellant from the judgment of the Supreme Court, New York County (Cropper, J.), rendered on Jan-

uary 31, 1979, convicting defendant of promoting a sexual performance by a child, and said appeal having been argued by Mr. Herald P. Fahringer of counsel for the appellant, and by Mr. Donald J. Siewert of counsel for the respondent; and due deliberation having been had thereon,

It is unanimously ordered and adjudged that the judgment so appealed from be and the same is hereby, in all things, affirmed. The case is remitted to the Supreme Court, New York County, for further proceedings pursuant to CPL § 460.50(5).

Enter:

JOSEPH J. LUCCHI
Clerk.

Counsel for appellant is referred to
§ 606.5, Rules of the Appellate
Division, First Department.

APPENDIX C

Opinion and Order of the New York Supreme Court Denying Respondent's Motion to Dismiss the Indictment

SUPREME COURT

TRIAL TERM, NEW YORK COUNTY

October 24, 1978

THE PEOPLE OF THE STATE OF NEW YORK,

Plaintiff,

v

PAUL IRA FERBER,

Defendant.

APPEARANCES OF COUNSEL:

Herald Price Fahringer for defendant.
Robert M. Morgenthau, District Attorney (*Benjamin Brafman* and *Philip Kunsberg* of counsel), for plaintiff.

OPINION OF THE COURT

IRVING LANG, J.

In 1977, the Legislature of the State of New York enacted chapter 910 of the Laws of 1977, entitled "AN ACT

to amend the penal law, in relation to sexual performances by children," which added article 263 to the Penal Law of this State.

The defendant, apparently the first person prosecuted under this statute, now challenges the constitutionality of article 263.

THE FACTS

The People allege that on March 5 and March 7, 1978, an undercover agent went to the defendant's bookstore in New York County and purchased two films which the defendant purportedly depicted as "Kiddie Films." Subsequently the defendant was arrested and indicted for violations of section 263.10 of the Penal Law (promoting an obscene sexual performance by a child) and section 263.15 of the Penal Law (promoting a sexual performance by a child).

ARTICLE 263

The two specific provisions of article 263 of the Penal Law provide as follows:

"§ 263.10—Promoting an obscene sexual performance by a child.

"A person is guilty of promoting an obscene sexual performance by a child when, knowing the character and content thereof, he produces, directs or promotes any obscene performance which includes sexual conduct by a child less than sixteen years of age."

"§ 263.15—Promoting a sexual performance by a child.

"A person is guilty of promoting a sexual performance by a child when, knowing the character and content thereof, he produces, directs or promotes any performance which includes sexual conduct by a child less than sixteen years of age."*

The operative terms employed in both sections are further defined in section 263.00 of the Penal Law as follows:

"As used in this article the following definitions shall apply:

"1. 'Sexual Performance' means any performance or part thereof which includes sexual conduct by a child less than sixteen years of age.

"2. 'Obscene sexual performance' means any performance which includes sexual conduct by a child less than sixteen years of age in any material which is obscene, as such term is defined in section 235.00 of this chapter.

"3. 'Sexual conduct' means actual or simulated sexual intercourse, deviate sexual intercourse, sexual beastiality [*sic*], masturbation, sadomasochistic abuse, or lewd exhibition of the genitals.

"4. 'Performance' means any play, motion picture, photograph or dance. Performance also means any other visual representation exhibited before an audience.

"5. 'Promote' means to procure, manufacture, issue, sell, give, provide, lend, mail, deliver, transfer, transmute, publish, distribute, circulate, disseminate, present, exhibit or advertise, or to offer or agree to do the same.

---

* These new offenses are punishable as class D felonies, which carry a maximum imprisonment for up to seven years as to individuals, and as to corporations a fine of up to $10,000 (Penal Law, §§ 70.00, 80.10).

"6. 'Simulated' means the explicit depiction of any of the conduct set forth in subdivision three of this section which creates the appearance of such conduct and which exhibits any uncovered portion of the breast, genitals or buttocks.

"7. 'Deviate sexual intercourse' means the conduct defined by subdivision two of section 130.00 of this chapter.

"8. 'Sado-masochistic abuse' means the conduct defined in subdivision five of section 235.20 of this chapter."

THE CHALLENGE

Implying that the very fabric of the First, Fifth and Fourteenth Amendments of the United States Constitution (and the corresponding provisions of the New York State Constitution) would be shredded by upholding article 263 of the Penal Law, the defendant asserts that the statute is overly broad, vague, irrational, arbitrary, serves no legitimate State interest, is penally excessive and violates the doctrine of equal protection of the laws.

THE LAW

Before discussing the specific provisions of sections 263.10 and 263.15 of the Penal Law certain postulates should be noted.

First. Obscene material has no constitutional sanction or protection (*Roth v United States,* 354 US 476; *Miller v California,* 413 US 15).

Second. The statutory definition of obscenity in section 235.00 of the Penal Law, incorporated by reference in article 263 of the Penal Law, tracks the guidelines of the

United States Supreme Court in *Miller v California* (413 US 15, 24, *supra*). They are "(a) whether 'the average person, applying contemporary community standards' would find that the work, taken as a whole, appeals to the prurient interest * * * (b) whether the work depicts or describes, in a patently offensive way, sexual conduct as specifically defined by the applicable state law; and (c) whether the work, taken as a whole, lacks serious literary, artistic, political or scientific value."

Third. The well-being of children is a subject long recognized as within a State's constitutional power to regulate, particularly in relation to sexual matters. (*Ginsberg v New York,* 390 US 629; *Prince v Massachusetts,* 321 US 158; *Miller v California,* 413 US 15, *supra; Paris Adult Theatre I v Slaton,* 413 US 49.) In *Prince* (*supra*), the Supreme Court held that the State has legitimate interests in both protecting the welfare of its children and in seeing that they are safeguarded from abuses which might prevent their growth into free and well-developed citizens.

This proper concern for the welfare of children might well restrict what otherwise would be constitutionally protected conduct.

Even in those cases where ordinances have been struck down as facially invalid, the right of a Legislature to enact laws to protect children vis-à-vis sexual material has been sustained. Reversals have resulted primarily because statutes were drafted too broadly. (Cf. *Calderon v City of Buffalo,* 61 AD2d 323; *Erznoznik v City of Jacksonville,* 422 US 205.) It is merely an example of the court telling the Legislature: "Do it, till you do it right."

VAGUENESS

Within the context of the above discussion we will now examine the contentions of the defendant. Both sections 263.10 and 263.15 are alleged to "suffer from the constitutional vice of vagueness." It is claimed that legislation limiting freedom of expression which fails to give fair notice of what acts will be punished violates the Constitution (*Winters v New York*, 333 US 507; *People v Kahan*, 15 NY2d 311).

While the principle is correct, the application is erroneous. The defendant asserts that the definition of sexual conduct fails to provide necessary notice to those who may be subject to its provision as to what is prohibited or permitted. The statute is manifestly sufficiently definite to give a person of ordinary intelligence fair notice of what conduct is forbidden (*People v Smith*, 44 NY2d 613).

Indeed, most of the prohibited forms of sexual conduct are described with anatomical precision. Further, there is a requirement of "*scienter*" limiting liability to those who know the character and content of what is being promoted (*Ginsberg v New York*, 390 US 629, 644, *supra*). The statute clearly provides "reasonably ascertainable standards of guilt" (*Mishkin v New York*, 383 US 502, 507); and the defendant, knowing the content of what he is distributing, will recognize when his conduct approaches the brink of illegality. (*Roth v United States*, 354 US 476 *supra*.)

AFFIRMATIVE DEFENSES

The defendant also challenges the affirmative defenses to the statutes by nature of their alleged discriminatory and arbitrary classifications, which it is claimed violate the equal protection clause of the Fourteenth Amendment.

Subdivision 2 of section 263.20 of the Penal Law evidences the Legislature's intent to carve out a special defense to projectionists, librarians, ushers, etc., but fails to provide the same defense to similarly situated nonmanagerial employees in other types of establishments, such as, in the instant case, a bookstore. Suffice it to say that the defendant, allegedly the principal owner of the bookstore, lacks the requisite standing to attack this provision, as he is not of the class affected by its application. "[A] person to whom a statute may constitutionally be applied will not be heard to challenge that statute on the ground that it may conceivably be applied unconstitutionally to others". (*Broadrick v Oklahoma*, 413 US 601, 610.) As the court in *United States v Raines* (362 US 17, 22) stated: "The delicate power of pronouncing an Act * * * unconstitutional is not to be exercised with reference to hypothetical cases".

SECTION 263.10

The defendant specifically challenges the validity of section 263.10 of the Penal Law, promoting an obscene sexual performance by a child, as overbroad, vague and irrational and additionally carries an unconstitutionally excessive penalty. The thrust of the defendant's argument is that the statute escalates punishment of obscene material, ordinarily a misdemeanor (maximum one year) to a class D felony (maximum seven years) by the mere inclusion of a particular segment, sexual conduct by a child, which in and of itself may not be legally obscene. Thus, argues counsel in his brief, "a tasteful depiction of sexual conduct by a juvenile would, if it satisfied the standard of Miller, supra, militate against a finding that the work is obscene, and, if

the jury would find that in spite of the presence of such protected expression the performance or vehicle is nevertheless obscene, this very same depiction would serve to increase the defendant's penalty drastically".

One might wonder how to create a nonobscene "tasteful depiction" of sexual conduct by a juvenile within an overall obscene performance. It is difficult to conceive of a "tasteful depiction" of sodomy or masturbation or beastiality [*sic*].

But even if such a nonobscene, tastefully depicted sexual conduct by a child was possible (a highly doubtful proposition), the defendant's contention must fail.

The primary purpose of the statute is the protection of children. The purpose is "To eliminate the sexual exploitation of children by establishing strict criminal sanctions against individuals who induce children to participate in sexual performances and who profit from the distribution of such material" (Memorandum in Support A-3587-C, Assemblyman Lasher).

This is a valid legislative purpose, reasonable and rational, as is the escalation of penalty for those who abuse or profit from such exploitation. The increased penalty neither shocks the conscience nor offends this court's sense of fundamental fairness.

SECTION 263.15

The major attack on the statute is addressed to section 263.15 of the Penal Law, promoting a sexual performance by a child. This section poses greater constitutional problems, for the section prohibits sexual conduct by a child, even if the performance is within a constitutionally protected context. This clearly was the intent of the Legislature.

"Although one promotion section of the new Article is based on an obscenity standard, the primary intent of the Article is to make the inducement of children to engage in sexual performances and the promotion of such material absolutely prohibited. It is irrelevant to the child whether or not the material is obscene or has a literary, artistic, political, or social value. In essence this Article would make material containing children in sexual performances, *no matter what the purpose,* against the public policy of this state" (Memorandum in Support A-3587-C, Assemblyman Lasher; emphasis in original).

Hence our Legislature has said that even within a work of obvious literary or artistic merit, sexual conduct by a child, as defined in article 263 of the Penal Law, is prohibited.

This poses the not unusual dilemma of balancing the right of freedom of expression against the right of the Legislature to protect children against sexual exploitation. The "variable obscenity" test (what may be constitutionally protected for adults is not necessarily protected for children) is inapposite since "variable obscenity" refers to distribution of sexual material to minors. Here, we are dealing with use of minors in performances of sexual conduct (*Ginsberg v New York,* 390 US 629, *supra*).

On balance, the protection of children must prevail. Further, the likelihood that children performing sexual intercourse or lewdly exhibiting their genitals would constitute an important part of a performance is highly remote in any event. If it were important for literary or artistic value, a juvenile over 16 who perhaps looked younger could be utilized. Simulation outside of the pro-

hibition of the statute could provide another alternative. Where alternate means to safeguard expression are reasonably available, courts should not declare statutes unconstitutional which may inhibit such expression but which have independent and overriding justification.

In the words of the United States Supreme Court in *Broadrick v Oklahoma* (413 US 601, 615-616, *supra*) this case finds the statute "not substantially overbroad and that whatever overbreadth exists should be cured through case-by-case analysis of the fact situations to which its sanctions, assertedly, may not be applied."

Indeed, it would seem anomalous for the State to be able to prohibit the employment of a child under 16 from working as a stagehand but be prevented from prohibiting the use of that child to engage in sexual intercourse on stage.

While the defendant's attack on the statute invokes the spectre of Peter Zenger, Henry Miller, James Joyce, and D. H. Lawrence being imprisoned for violating its provisions, in reality we are dealing with two 8 mm. films, apparently 10 minutes in duration, one depicting a boy masturbating, the other a group of boys engaging in sexual conduct.

In sum, I find no constitutional impediment to this legislation. Its impact on limiting legitimate free expression is remote, hypothetical and speculative. It is aimed at curbing the pernicious practice of profiteering in the sexual exploitation of children, a proper purpose, properly enacted.

The motion to dismiss the indictment on constitutional and all other grounds is denied.

Office-Supreme Court, U.S.
FILED
AUG 28 1981
ALEXANDER L. STEVAS,
CLERK

No. 81-55

In The

Supreme Court of the United States

OCTOBER TERM, 1981

THE PEOPLE OF THE STATE OF NEW YORK,
Petitioner,

v.

PAUL IRA FERBER,
Respondent.

On Petition For Writ Of Certiorari To The New York State Court Of Appeals

BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

QUESTION PRESENTED

Whether a state statute which abridges the public's First Amendment right to view films and other visual portrayals of *non-obscene* adolescent sexual conduct can be upheld.

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In The

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On Petition For Writ Of Certiorari To The New York State Court Of Appeals

---

BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

Respondent PAUL IRA FERBER prays that a writ of certiorari to review the judgment of the New York Court of Appeals, entered on May 12, 1981, be denied.

Opinion Below

The opinion of the Court of Appeals, dated May 12, 1981 is printed in the Appendix to the Petition at pages 1a-16a and is reported (52 N.Y.2d 674 [1981]).

Jurisdiction

Respondent Paul Ferber was found guilty in the New York Supreme Court of two counts of promoting a sexual performance by a child in violation of New York Penal Law § 263.15. On January 31, 1979 respondent was sentenced to 45 days in prison and a conditional discharge on each count, the sentences to run concurrently.

On February 28, 1980 the Appellate Division, First Judicial Department affirmed the conviction without opinion (74 A.D.2d 558, 424 N.Y.S.2d 967). On May 12, 1981 the New York Court of Appeals reversed the conviction and dismissed the indictment, holding the statute unconstitutional because it "would in many, if not all, cases prohibit the promotion of materials which are traditionally entitled to constitutional protection from government interference under the First Amendment" (52 N.Y.2d at 678).

A petition for a writ of certiorari was served upon respondent on July 13, 1981. The jurisdiction of this Court was invoked under 28 U.S.C. §1257(3). This brief in opposition to the petition is filed within sixty days of that service, an extension of time having been granted by the Clerk of the Court.

Constitutional Provisions and Statutes Involved

The text of the First Amendment and section one of the Fourteenth Amendment to the United States Constitution are set forth in Appendix A of this brief, along with New York Penal Law §§ 263.05, 263.10 and 263.15.

Statement of the Case

On March 2, 1978 an undercover police officer, posing as an out-of-town salesman, and a "collector" of "kiddie porn", purchased two films involving children from respondent Paul Ferber at the Madison Square Book Shop located at 488 Eighth Avenue, in Manhattan. One week later, respondent was arrested and his store searched. Subsequently, he was indicted and tried for violating New York Penal Law §§ 263.10 (promoting an *obscene* sexual performance by a child) and 263.15 (promoting a sexual performance by a child).

Respondent argued that Penal Law § 263.15 was unconstitutional because protected First Amendment speech came within its clutches. The Honorable Irving Lang ruled on October 24, 1978 that there was "no constitutional impediment to this legislation" (*People v. Ferber*, 96 Misc.2d 669, 409 N.Y.S.2d 632, 637 [Sup. Ct. 1978]).

Upon the denial of the motion to dismiss, respondent proceeded to trial. The jury, after two days of deliberation, found respondent guilty of violating Penal Law § *263.15* but acquitted him on the counts charging violations of § 263.10 (promoting an *obscene* sexual performance by a child).

On January 31, 1979, the trial court sentenced Paul Ferber to 45 days in prison and a conditional discharge on count three of the indictment, the same sentence to run concurrently on count four.

On February 28, 1980, the Appellate Division, First Judicial Department of the Supreme Court of the State of New York affirmed respondent's conviction without opinion (74 A.D.2d 558, 424 N.Y.S.2d 967 [1st Dept. 1980]).

New York Court of Appeals Decision

The conviction was reversed and the indictment dismissed on May 12, 1981 when the Court of Appeals held that:

> "[T]he statute discriminates against films and other visual portrayals of nonobscene adolescent sex solely on the basis of their content, and since no justification has been shown for the distinction other than special legislative distaste for this type of portrayal, the statute cannot be sustained . . ." (52 N.Y.2d at 681).

Relying upon the fundamental tenet that "First Amendment standards remain applicable whenever the effect of a government regulation is to curtail protected modes of expression . . ." (*Id.* at 679), the Court of Appeals rejected the state's justification for the unconstitutional legislation (protecting the health and well-being of children). Furthermore, in concluding that the statute was "strikingly underinclusive", the court noted that:

> "Section 263.15 does not prohibit the knowing sale or promotion of any film, or other item, in which a child has performed a dangerous stunt or where production required a child to engage in any of the numerous activities in which the Legislature in the exercise of its police power has determined is dangerous to the health or well-being of child employees . . ." (*Id.* at 680).

Finally, in answer to the anticipated outcry from certain public groups and the erroneous claims of the dissenting judges below, the Court of Appeals concluded that:

> "[I]t is important to emphasize that the statute considered in this case (Penal Law § 263.15) does not deal with child pornography. Those who employ children in obscene plays, films and books, are still subject to prosecution as are those who sell or promote such materials (see Penal Law, §§ 263.05; 263.10). We merely hold that those who present plays, films, and books portraying adolescents cannot be singled out for punish-

ment, simply because they deal with adolescent sex in a realistic but nonobscene manner" (*Id.* at 681).

Thus, in a few words, this is what this case is all about.

REASONS FOR DENYING THE WRIT

I

The New York penal law which attempts to regulate visual material dealing with young people engaged in various forms of sexual activity, without including the requirement that the sexual performance be legally obscene, is unconstitutional as it encompasses protected speech within its ambit, as correctly held by the New York Court of Appeals.

The controversy over New York's patently unconstitutional child pornography statute, which makes criminal the promotion of visual portrayals of adolescent sex even when the performance is protected by the First Amendment, has become complicated by the hysteria surrounding the public's concern over the exploitation of children. When a legal question becomes so completely hostage to fear, the capacity to analyze it is lost and contention absorbs all our intellectual energy. Fortunately, New York's highest court was able to ignore the frenzy and follow an unbroken series of cases extending over a long stretch of this Court's history that hold statutes regulating what the public may read or see must contain the constitutional requirement that the performance be legally obscene. Moreover, an analysis of Penal Law § 263.15 confirms that by striking down this patently unconstitutional legislation, New York has lost none of the protections of innocent children from the supposed harm attendant their participation in the making of sexual films and photographs.

Legislative History

In November, 1977, the New York legislature launched a major offensive against the exploitation of young people in sexual films. The attack was spearheaded by three new sections of the Penal Law — §§ 263.05, 263.10, and 263.15.

Section 263.05 makes it a class C felony for a person to *use* a child in a sexual performance. This statute stops people from actually using children in the production of sexual photographs and motion pictures.

The second provision, Penal Law § 263.10, makes it a class D felony for a person to promote an *obscene* sexual performance by a child. This law requires that the sexual performance be *legally obscene*, in accordance with a long line of cases decided in this Court interpreting the First Amendment.

The third section, *263.15*,* which the New York Court of Appeals found to prohibit the promotion of materials which are traditionally entitled to constitutional protection under the First Amendment, makes it a class D felony for a person to merely promote a sexual performance of a child. Section *263.15* eliminates entirely the constitutional requirement that the sexual performance be legally obscene. Thus, this misdirected law was destined to ultimately meet with destruction sooner or later. Fortunately, the New York Court of Appeals had the courage to take the necessary action.

As demonstrated by the chart on the following page, §§ 263.10 and *263.15* are virtually identical. The only difference between the two provisions is that § 263.10 requires that the performance be *legally obscene*, while that essential element is conspicuously missing from § *263.15*. Obviously, the legislature in creating § 263.10 anticipated the risk that § *263.15* would be

*To avoid confusion, the unconstitutional provision (§ 263.15) always appears in italics throughout this brief.

263.10—PROMOTING AN OBSCENE SEXUAL PERFORMANCE BY A CHILD

A PERSON IS GUILTY OF PROMOTING AN *OBSCENE* SEXUAL PERFORMANCE BY A CHILD WHEN, KNOWING THE CHARACTER AND CONTENT THEREOF, HE PRODUCES, DIRECTS OR PROMOTES ANY *OBSCENE* PERFORMANCE WHICH INCLUDES SEXUAL CONDUCT BY A CHILD LESS THAN SIXTEEN YEARS OF AGE.
(CLASS D FELONY)

263.15—PROMOTING A SEXUAL PERFORMANCE BY A CHILD

A PERSON IS GUILTY OF PROMOTING A SEXUAL PERFORMANCE BY A CHILD WHEN, KNOWING THE CHARACTER AND CONTENT THEREOF, HE PRODUCES, DIRECTS OR PROMOTES ANY PERFORMANCE WHICH INCLUDES SEXUAL CONDUCT BY A CHILD LESS THAN SIXTEEN YEARS OF AGE.
(CLASS D FELONY)

invalidated. This conclusion is inescapable because § *263.15*, if constitutional, covers every form of youthful sexual activity contemplated by § 263.10. In other words, since § *263.15* covers every type of sexual performance by a child, regardless of whether or not it is obscene, there is no need for § 263.10. The prophylactic purpose of this statutory scheme is well served by §§ 263.05 and 263.10. There is no need for § *263.15* for there is in existence an adequate arsenal to sustain the legal war against child pornography.*

The individuals who are responsible for the potential danger to a child's welfare are the photographer, cameraman, producer, director, and writer of the work — in other words, those who actually *use* the child in the sexual performance. These very acts, which are the direct cause of any harm to the child, are already expressly prohibited by Penal Law § 263.05, which subjects those who "employ, authorize, or induce a child less than sixteen years of age to engage in a sexual performance" to conviction and imprisonment up to 15 years. The root of the problem lies in the making of these pictures. Obviously, the legislature recognized this was the primary evil, for the law.naking body designated the use of a child in a sexual performance as a class C felony. The qualitatively different and much removed conduct of promoting an obscene sexual per-

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*In declaring overbroad the Texas statute making it a felony for a person commercially to possess, exhibit, distribute or sell any motion picture or photograph showing a person younger than 17 years of age observing or engaging in sexual conduct, the court in *Graham v. Hill*, 444 F.Supp. 584 (W.D. Tex. 1978), emphasized:

> "[T]his holding does not leave Texas without a means of dealing with the problem of child pornography, quite apart from enforcement of [the invalidated section]. Other of the state's criminal obscenity statutes are addressed to the exploitation of minors in the creation of pornographic materials, and the state has the authority under those laws to prosecute persons who actually use minors in the production or dissemination of obscene materials or performances" (444 F.Supp. at 594).

formance by a child, such as the selling of a magazine containing such depictions, received only a D felony classification. Even the patently unconstitutional § *263.15* was accorded D felony status. Had the lawmakers found that the mere dissemination of materials with pictures of youthful sexual activity created as great a risk of harm to the children used to make the pictures, then surely the legislature would have denominated §§ 263.10 and *263.15* as well as § 263.05, C felonies.* Thus, petitioner's attempt to justify § *263.15* as necessary to protect children from sexual abuse and psychological harm arising from the activities of certain filmmakers and photographers must fail.

The unexamined assumption that by eliminating sources of distribution, those who make films of children engaged in sex will be discouraged, is a dangerous doctrine. When newspapers and magazines publicize the large ransoms obtained by hijackers, terrorists, and kidnappers, others are inevitably encouraged to attempt similar crimes. But it would be unthinkable to make it a felony for any person to sell a newspaper or magazine that contained reports of this kind. The making of bombs is illegal but not the sale of a book with instructions of how to make explosives. It is unlawful to make or sell untaxed whiskey and cigarettes but it is not a crime to buy those products. There are many instances in the criminal law where statutes are passed that prevent the creation of a direct harm to individuals but go no further for good reason. The objective of these new laws ought to be the protection of children from sexual corruption and not the viewing of pictures of them which harm no one. As the court below correctly held, § *263.15* imposes significant burdens on free speech with little or no

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*See *People v. Folk*, July 10, 1981 *New York Law Journal* (Sup. Ct. N.Y. Co.), where defendant's plea of guilty to attempted use of a child in a sexual performance (Penal Law §§ 110.00, 263.05) was upheld in the wake of the New York Court of Appeals decision holding §263.15 unconstitutional.

assurance of any additional safeguards for children other than those already provided by §§ 263.05 and 263.10.

Arnold D. Hechtman, a leading authority on statutory construction in New York, who wrote the Practice Commentary for *§ 263.15*, expressed his misgivings over this impaired law by declaring:

> "It may thus be argued that § 263.10 is unnecessary since the conduct defined therein already falls within the broader scope of § 263.15.
>
> "It is precisely this broad reach of § 263.15 that renders it of questionable validity. It appears to encompass, for example, an unobscene play or motion picture of genuine artistic merit which happens to include one fleeting scene where a child simulates masturbation. It could also apply to a person who gives someone a gift ('promotes') of a fine book which contains one photograph ('performance') depicting innocent 'sexual conduct' by a child. Concededly, these examples are somewhat extreme and it is to be hoped that law enforcement authorities would not make arrests or conduct prosecutions in these and similarly innocuous situations. However, since the language of the statute clearly reaches such conduct, its validity is, at least, suspect" (McKinney's Consolidated Laws, Penal Law § 263.15, Vol. 39, at 434, 435).*

A study of the legislative history of this statute, including an investigation of the written comments contained in the legislative jacket, shows that scholars, journalists, and other interested citizens have cited long lists of abuses that could come from this overly harsh statute.**

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*Ironically, even Judge Irving Lang, who first ruled on the propriety of *§ 263.15*, displayed his doubts over this statute by stating:

> "This section [263.15] poses greater constitutional problems for the section prohibits sexual conduct by a child, even if the performance is within a constitutionally protected context" (*People v. Ferber*, 96 Misc.2d 669, 409 N.Y.S.2d 632, 637 [Sup. Ct., N.Y. Co. 1978]).

**McKinney's Session Laws of 1977, ch. 910, § 1.

Similar Statutes Held Unconstitutional

The list of states which have enacted child pornography laws has grown dramatically within the last two years to include almost all of the states. Nearly half of the state provisions — 22 laws — as well as the federal statute, have retained the constitutional component requiring that the proscribed sexual performance be legally obscene.* What may be called the more enlightened states, such as California, Connecticut, Illinois, Michigan, Minnesota, and Ohio have all included the obscenity term. Moreover, even some of the most conservative states such as Alabama, Florida, Missouri, North Carolina, South Carolina, Tennessee, and Virginia have shied away from the perilous approach of eliminating the obscenity requirement.

Our investigation reveals that none of the remaining newly enacted provisions which fail to contain this essential constitutional ingredient has been judicially approved by the state's highest court.** Furthermore, not only has New York's statute been struck down, the Texas law (9 § 43.25) was declared unconstitutional in *Graham v. Hill*, 444 F.Supp. 584 (W.D. Tex. 1978).*** There still exists the possibility, however, that

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*18 U.S.C. § 2252; Ala. § 13-7-230 *et seq.*; Cal. Labor Code § 1309.5; Conn. §§ 53a-193, 53a-196b; Fla. § 847.014; Ga. § 54-9903; Idaho §§ 18-1517A, 18-4101-03; Ill. 38 § 11-20a; Ind. § 30-11.1; Md. § 419A; Mich. § 750.145c; Minn. § 617.246; Mo. § 568.060; Neb. § 28-1463; N.H. § 650:2; N.C. § 14-190.6; N.D. § 12.1-27.1-02, 03; Ohio § 2907.321; Ore. § 163.477; S.C. § 16-15-380; S.D. 22-22-24, 22-22-25; Tenn. § 39-1019; Va. 18.2-374.1.

**Significantly, some of the statutes which lack an obscenity requirement merely criminalize the use of children in the *production* of sexual performances, as opposed to the *dissemination* of materials depicting sexual performances by children. *See, e.g.*, Alas. § 11.41.455; Iowa § 728.12; Nev. § 200.509; N.M. § 30-6-1; Utah § 76-10-1206.5.

***The New York law was first found unconstitutional by Hon. Robert Ward in *St. Martin's Press, Inc. et al. v. Carey et al.*, 440 F.Supp. 1196 (S.D.N.Y. 1977), but the Second Circuit reversed that judgment and dismissed the complaint on the grounds there was no "case or controversy" (605 F.2d 41 [2d Cir. 1979]).

the 19 statutes with no obscenity requirement, cited by petitioner, may yet be upheld by the highest courts of their respective states. Thus, we respectfully suggest that the granting of the petition would ultimately require the affirmance of the New York Court of Appeals decision and similarly render unconstitutional these 19 state laws, which may yet be upheld *in their own states*. For this reason alone, the petition should be denied.

Moreover, the law is well settled that a state may afford a defendant greater rights than those held to be necessary by this Court. *See, e.g., Oregon v. Hass*, 420 U.S. 714, 719 (1975); *Cooper v. California*, 386 U.S. 58, 62 (1967). In its decision the New York Court of Appeals has accorded the First Amendment the deference to which it is entitled. Even if that level of protection exceeds that which this Court would have found necessary, New York's decision may nevertheless stand for it does not in any way infringe upon federal constitutional rights — indeed, it expands upon them in a way which must be respected.

The Statute's Overreach

Without the "obscenity" control factor, *§ 263.15* is clearly overbroad for it outlaws any production dealing with adolescent sex, whether it be a play, a motion picture or scientific text. Regardless of its literary, artistic, political or scientific value, it would come within the confines of this defective law. If a book contains a single picture or illustration of an adolescent engaged in simulated sex, it faces prosecution. For instance, a Broadway play showing the rape of a fifteen-year-old girl: a nudist magazine exhibiting a young person's genitals "lewdly displayed"; an illustrated book of sexual instruction for children, such as *Show Me*;* or a medical text with illustrations

*The book *Show Me*, winner of several literary awards, was the subject of the *St. Martin's Press* action previously described.

of a child masturbating, would all come under the shadow of this aberrant statute.

The films *The Exorcist* (Linda Blair masturbating); *Pretty Baby* (Brooke Shields engaged in simulated sex); *Luna* (Jill Clayburgh masturbating her son); as well as a number of other motion pictures, such as *Lolita* and *Taxi Driver*, could have been condemned under this bad law. A literal application of this unbridled legislation would endanger such works as sociological or anthropological documentary films or publications depicting "coming of age" rituals and treatises portraying children engaged in so-called "sexual conduct" as well as other culturally indispensible and acceptable forms of expression.*

There is presently a growing curiosity about prepubescent sex in the United States. Recently, the Department of Health, Education and Welfare launched a major investigation into the subject of incest. As incredible as it may seem, if the Government published an illustrated book dealing with this controversial subject, the author or distributor could be sent to prison, regardless of the work's scientific worth or literary value.

These are just a few examples of the apocalyptic impact this renegade statute will have upon films and books the adult population should have the right to read if they please. Section *263.15* looms upon the literary horizon as a constant threat to worthwhile productions dealing with the sexual conduct of young people which may be publicly acceptable.

The real terror of this statute's injunction lies not so much in what may be prosecuted and banished but what will inevitably be left unwritten. History has taught us that laws of this kind inhibit the production of films and books which may be useful to

*As the court below emphasized, "[the statute] applies equally to a live performance of a Broadway play and a filmed report of New Guinea fertility rites" (52 N.Y.2d at 680).

society. Their creation is stayed by the fear that the publisher or distributor may go to prison. This sad state of affairs cannot be tolerated in a free society.

Any legislative enactment which bans virtually all forms of sexual expression, especially that which is not legally obscene, is classically overbroad and unconstitutional. When a statute's facial overbreadth chills, and in fact condemns protected material, as well as places standardless discretion in the hands of local governmental functionaries, it cannot pass constitutional muster.* It would be hard to find a more classic example of overbreadth in a statute. No matter how *§ 263.15* is viewed or construed, it prohibits the distribution of all forms of expression of sexual conduct by a person under sixteen years of age *regardless:*

(1) whether it possesses literary, artistic or scientific value, or

(2) does not appeal to anyone's prurient interest, or

(3) is completely acceptable to the community.

Any statute which suppresses literature which is unquestionably protected by the First Amendment cannot be sustained. Therefore, *§ 263.15* was properly declared unconstitutional and the decision of New York's highest court need not be reviewed.

The Law of Obscenity

Under the First Amendment a state cannot ban all books or films dealing with adolescent sex. It can only proscribe those productions which are obscene, as that term has been defined by this Court. Thus, as recognized by the court below, *§ 263.15*,

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**Erznoznik v. Jacksonville*, 422 U.S. 205 (1975); *Bigelow v. Virginia*, 421 U.S. 809 (1975); *Doran v. Salem Inn, Inc.*, 422 U.S. 922 (1975); *Grayned v. Rockford*, 408 U.S. 104 (1972); *Gooding v. Wilson*, 405 U.S. 518 (1972); *Coates v. Cincinnati*, 402 U.S. 611 (1971); *Dombrowski v. Pfister*, 380 U.S. 479 (1965); *United States v. Raines*, 362 U.S. 17 (1960).

which authorizes the condemnation of materials which are not legally obscene, represents an abrupt departure from this long tradition deeply woven into the fabric of the First Amendment.

For over twenty years this Court has held that only obscene matter falls outside the protection of the First Amendment. *Miller v. California*, 413 U.S. 15 (1973). Indeed, in *Miller*, this Court took great pains to emphasize the need for carefully-drawn legislation whenever a state seeks to restrict any form of expression and engineered the three-part constitutional test which must be fulfilled before any work may be deemed obscene, and therefore cast outside the precincts of the First Amendment. Statutes which stray from this strict constitutional requirement are void.*

**See, e.g., Joseph Burstyn, Inc. v. Wilson*, 343 U.S. 495 (1952) ("sacrilegious"); *Gelling v. Texas*, 343 U.S. 960 (1952) ("prejudicial to the best interests of the people"); *Commercial Pictures Corp. v. Regents*, 346 U.S. 587 (1954) ("immoral" or "tend to corrupt morals"); *Holmby Productions, Inc. v. Vaughn*, 350 U.S. 870 (1955) ("approved . . . moral and proper [publications]"); *Kingsley International Pictures Corp. v. Regents*, 360 U.S. 684 (1959) ("desirable, acceptable or proper"); *Interstate Circuit, Inc. v. Dallas*, 390 U.S. 676 (1968) ("portrayal of sexual promiscuity as 'profitable, desirable, acceptable, respectable, praise-worthy or commonly accepted' "); *Winters v. New York*, 333 U.S. 507 (1948) ("which tends to incite minors to violent or depraved or immoral acts"); *Rabeck v. New York*, 391 U.S. 462 (1968) ("magazines . . . which would appeal to the lust of persons under the age of eighteen years or to their curiosity as to sex or to the anatomical difference between the sexes"); *Radford v. Webb*, 446 F.Supp. 608 (W.D.N.C. 1978), *aff'd*, 596 F.2d 1205 (4th Cir. 1979) ("any words or language of a profane, vulgar, lewd, lascivious or indecent character, nature or connotation"); *Hillsboro News Co. v. Tampa*, 451 F.Supp. 952 (M.D. Fla. 1978) ("offensive sexual materials"); *People v. Bookcase, Inc.*, 14 N.Y.2d 409, 252 N.Y.S.2d 433 (1964) ("any book . . . the cover or content of which exploits, is devoted to, or is principally made up of descriptions of illicit sex or sexual immorality"); *Calderon v. Buffalo*, 61 A.D.2d 323, 402 N.Y.S.2d 685 (4th Dept. 1978) ("any book . . . which is obscene, lewd, lascivious, or indecent, or which consists of pictures of nude or partially denuded figures posed or presented in a manner to provoke or arouse lust or passion . . .").

The *Miller* test has flourished because it strikes a reasonable accommodation between the state's interest in controlling obscene material and the public's right to choose what it will read or see. Therefore, no law is constitutional unless it contains this essential element.

The Laws Protecting Children

A voyage backward through the legal history of statutes designed to protect children reveals that laws similar to *§ 263.15* have never survived constitutional attack. In the same year the Court decided the *Roth** case it considered, for the first time, a law designed to protect children from obscene material. In *Butler v. Michigan*, 352 U.S. 380 (1957), the Court declared unconstitutional a statute which made the sale of books harmful to children illegal. Mr. Justice Frankfurter, in an incisive opinion, wrote:

> "We have before us legislation not reasonably restricted to the evil with which it is said to deal. The incidence of this enactment is to reduce the adult population of Michigan to reading only what is fit for children" (352 U.S. at 383).

The same statutory failings found in the *Butler* case are italicized by *§ 263.15*. It will eliminate from New York's literature and films *all* references to adolescent sex. This is not decorative rhetoric but involves genuine fears as documented in this brief. If this dangerous law is allowed to remain in the hands of prosecutors throughout New York, no serious film or illustrated book dealing with sexual conduct of young people will be safe.

Even the concept of "variable obscenity", with its aim of protection of children, does not forsake the constitutional requirement that obscenity be found before presumptively

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**Roth v. United States*, 354 U.S. 476 (1957).

protected materials can be suppressed. *Ginsberg v. New York*, 390 U.S. 629 (1968). Penal Law § *263.15* purports to regulate the type of material which may be consumed by *adults*. It is not designed to protect children from the prospect of unsavory publications falling into their hands. Penal Law §§ 235.20-235.22 already regulate that area and are an embodiment of the state's concern for its young citizens.

Nothing that was said in *Ginsberg v. New York* or that is inherent in the concept of "variable obscenity" indicates that the state legislatures may limit what adults read without including the essential requirement of obscenity. No matter how offensive the material in question may be, whether it be bestiality, necrophilia, or pedophilia, a free society should be permitted to decide for itself what is enjoyable or worthwhile so long as the material chosen is not legally obscene. The center of § *263.15* simply cannot hold under this weight of authority.

Since this Court first chartered this general course of law dealing with the subject of obscenity, it has never wandered from the formula requiring laws to include the requirement of obscenity. Thus, an analysis of these authorities leads to the inescapable conclusion that a state statute regulating what *adults* may read or see must contain the *obscenity* test. In other words, if it is not legally obscene, it should be available to the public. In this way the control of obsenity is left to the self-regulating forces of a society's taste, in the same fashion the investigation of all other controversial subjects is.

By declaring § *263.15* unconstitutional, society has not been left defenseless. Sections 263.10 and 263.05 are more than adequate to protect children from sexual exploitation. The loss of § *263.15* will in no way impair the prosecution of those who take unfair advantage of children in making sexual films. *See People v. Folk*, *supra*. It is simply not necessary to deprive New York's entire adult population of what may be worthwhile books or films, dealing with adolescent sex, when "no

justification has been shown for the distinction other than special legislative distaste for this type of portrayal . . ." (52 N.Y.2d at 681). The other formidable statutory weapons can effectively deal with this parochial evil.

For all these reasons the decision below holding § *263.15* unconstitutional is correct. History and logic are on our side and 22 states, as well as the federal government, stand with us. Accordingly, the petition for a writ of certiorari should be denied.

August, 1981

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APPENDIX A
Text of Constitutional Provisions and Statutes Involved

CONSTITUTIONAL PROVISIONS INVOLVED

Amendment I

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

Amendment XIV

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; or shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

APPENDIX A
Text of Constitutional Provisions and Statutes Involved

STATUTES INVOLVED

New York Penal Law § 263.05
Use of a child in a sexual performance

A person is guilty of the use of a child in a sexual performance if knowing the character and content thereof he employs, authorizes or induces a child less than sixteen years of age to engage in a sexual performance or being a parent, legal guardian or custodian of such child, he consents to the participation by such child in a sexual performance.

New York Penal Law § 263.10
Promoting an obscene sexual performance by a child

A person is guilty of promoting an obscene sexual performance by a child when, knowing the character and content thereof, he produces, directs or promotes any obscene performance which includes sexual conduct by a child less than sixteen years of age.

New York Penal Law § 263.15
Promoting a sexual performance by a child

A person is guilty of promoting a sexual performance by a child when, knowing the character and content thereof, he produces, directs or promotes any performance which includes sexual conduct by a child less than sixteen years of age.

No. 81-55

Office-Supreme Court, U.S.
FILED
AUG 26 1981
ALEXANDER L. STEVAS,
CLERK

IN THE

Supreme Court of the United States

October Term, 1981

THE PEOPLE OF THE STATE OF NEW YORK,

Petitioner,

against

PAUL IRA FERBER,

Respondent.

On Petition for Writ of Certiorari to the New York State Court of Appeals

REPLY BRIEF FOR PETITIONER

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IN THE

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October Term, 1981

THE PEOPLE OF THE STATE OF NEW YORK,

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PAUL IRA FERBER,

Respondent.

On Petition for Writ of Certiorari to the New York State Court of Appeals

REPLY BRIEF FOR PETITIONER

The brief in opposition to certiorari is based primarily on rhetoric, its theme being that the court below was correct on the merits. By addressing the merits, respondent apparently concedes that this case presents an unresolved and important issue. That concession becomes clear in respondent's conclusion at page 18 that his position is supported by twenty-two states. For that conclusion neglects the fact that nineteen other states have decided that they can best protect children by statutes similar to the New York provision which has been declared unconstitutional in this case. Given these diverse views on whether it is permissible to

protect children by prohibiting the dissemination of non-obscene material produced by the sexual exploitation of children, this case presents precisely the kind of issue which calls for a grant of certiorari.

Notably, in arguing the merits, respondent is frequently wrong. The most fundamental error is his insistence that "only obscene materials fall outside the protection of the First Amendment." *Brief in Opposition to Certiorari*:15. By so insisting, respondent ignores other utterances which are not protected by the First Amendment. *See Chaplinsky* v. *New Hampshire*, 315 U.S. 568, 571-72 (1942); *see also Brandenburg* v. *Ohio*, 395 U.S. 444, 447 (1969). More significantly, respondent ignores that the First Amendment is not absolute and that determining whether a particular statute has violated that amendment calls for a careful balancing of the competing interests. *See* TRIBE, AMERICAN CONSTITUTIONAL LAW, 581-82 (1978).

In this case, the First Amendment interest in the dissemination of materials produced by making children engage in sexual conduct must be balanced against the interest in protecting children from sexual abuse. Respondent apparently but mistakenly believes the issue has been resolved by the obscenity decisions of this Court, in particular *Ginsberg* v. *New York*, 390 U.S. 629 (1968).

As respondent points out, *Ginsberg* is a "variable" obscenity case which holds that the state may prohibit distribution to children of sexually explicit material which is not considered obscene when viewed by adults. The decision in that case is based upon the transcendent state interest

in protecting the general welfare of children. Here the interest is protecting children from actual abuse in the production of films, plays or photographs. This interest is substantially greater than that of protecting the general welfare of children which justified the prohibition on dissemination in the *Ginsberg* case.

Given the greater and different evil of sexually abused children, the obscenity test seems singularly inappropriate as a standard by which to evaluate legislation designed to deal with that evil. Thus, in striking the balance, the Court could eliminate the obscenity requirements that the work be taken as a whole and appeal to the prurient interest. *See Miller* v. *California*, 413 U.S. 15, 24-26 (1973). Further, the Court could modify or eliminate entirely the community standards requirement or, perhaps, modify any or all of the exceptions for serious artistic, literary, educational, or scientific works. *Id.*

Believing that no balance should be struck, respondent argues that the section in question, 263.15, is unnecessary. It is unnecessary because, according to respondent, section 263.10 prohibits the promotion of an obscene performance containing the sexual conduct of a child, and that section is more than adequate to deal with child pornography. Yet, as pointed out at pages 9-11 of the petition, and uncontradicted by respondent, there are good reasons why the Legislature decided that 263.15, without an obscenity requirement, was necessary to assure a statutory scheme which would be as effective as possible in protecting children.

In eliminating the obscenity requirement, and protecting children by prohibiting dissemination of all materials

produced by sexually abusing children, New York and nineteen sister-states follow a long tradition of prohibiting commerce in materials which are produced by socially harmful means. *See, e.g., United States* v. *Darby*, 312 U.S. 100, 116, 119, 125 (1941). The *Darby* case makes it at least arguable, if not clear, that New York could generally ban the dissemination of any products, including books or films, which have been manufactured by abusing children. Rather than enacting a general ban, New York, for good reason, has focused on a particular kind of abuse and a particular type of product.*

Respondent, however, opines that "the unexamined assumption that by eliminating sources of distribution, those who make films of children engaged in sex will be discouraged, is a dangerous doctrine." *Brief in Opposition*: 9. As seen by the authorities cited at page 17, n.5 in the petition, the assumption is neither unexamined nor incorrect. Nor is it a "dangerous" tactic—the prohibition of commerce in materials which are produced by socially harmful means is a long-accepted and frequently employed method of preventing social harms. *See e.g., United States* v. *Darby, supra.*

Respondent unpersuasively seeks to show the so-called danger by proffering a parade of horribles involving sup-

* Notably, in the state courts, respondent never argued that the Legislature created an unconstitutional classification by making it a felony to disseminate material depicting sexual conduct by children, but not punishing similarly the dissemination of other material depicting other kinds of child abuse or children engaged in dangerous activity. Further, the opposition to certiorari never even remotely intimates that the court below correctly decided this case because the statute creates an impermissible classification. Indeed, to the extent that the decision below is so based, there is no opposition to the petition's showing that such a decision presents a substantial constitutional question. *See* Petition: 17-18.

posed statutory prohibitions on the dissemination of news or scientific writings for the purpose of combatting political terrorists, or criminals. *Brief in Opposition*: 9. True, commerce in materials produced by illegal means may not be restricted, for example, to suppress news concerning illegal activity. The court below, however, did not invalidate the statute merely because of a possibly overbroad statutory ban on news dissemination or for that matter, on scientific or educational material. Rather, the court below believed itself bound by this Court's obscenity decisions. Thus it held that the state may not prohibit promotion of any non-obscene material, even material produced by sexually abusing children, such as the films sold by respondent.

At pages 12-14 respondent contends that any statute regulating non-obscene materials is by definition overbroad. For example, he says that such a prohibition would encompass a Broadway play which is not obscene in its entirety, but "shows" the rape of a fifteen-year-old girl. It is difficult, however, to see the constitutional objection to the statute if it permits prosecution of those who put on or sell tickets to such a show, if that show involves the actual sexual abuse of a child.

In further support of an overbreadth argument, indeed throughout this litigation, respondent has referred to certain popular movies, the showing of which he contends would have violated the New York statute. Notably, during oral argument in the New York Court of Appeals, counsel admitted that he had never seen any of the movies. In addition, these movies were never shown to any of the state courts which had this case before them. Moreover, each of these movies may not, in fact, depict children in a

manner forbidden by the New York statute. In this regard, counsel has never indicated any awareness of sophisticated cutting techniques which allow the use of adult doubles, thereby permitting the production of movies, including performances by some of the child actresses to whom he refers, without any actual sexual conduct by such children. *See, e.g., The New York Times,* June 15, 1980, §2, p. 25, col. 2 (report that a double was used to film Brooke Shields' nude scenes in *The Blue Lagoon*). And with respect to plays, producers have had little trouble finding adult performers to play children's roles. *See, e.g., The Village Voice,* September 24-30, 1980, pp. 36-37; *The Daily News,* December 12, 1980, p. 9, col. 2 (report that the producers of the Broadway production of *Lolita* auditioned seventy-five girls under the age of fourteen for the title role but finally chose a twenty-four-year-old actress to play the part).

More importantly, these and other examples, which, according to respondent, demonstrate the statute's overbreadth, beg the question whether there are any circumstances under which the state's interest in protecting children is sufficiently compelling to justify prohibiting the dissemination of some or all pictures, films or plays which are produced by making a child engage in sexual conduct. If this Court should hold that the state may in some circumstances prohibit dissemination of non-obscene materials produced by making children engage in sexual conduct, then this case would have to be remanded to the New York Court of Appeals. That court would then have to determine whether the statute could be construed, in accord with this Court's decision, to eliminate the remaining problems, if any, of overbreadth.

In sum, the decision below presents an important and substantial question calling for review by this Court. Significantly, respondent himself shows that there is a substantial question by his mistaken reliance on *Graham* v. *Hill*, 444 F.Supp. 584 (W.D. Tex. 1978), a decision striking down a Texas statute. *Brief in Opposition*: 8n. The Texas statute was much broader than that of New York and the basis for the court's decision rested on the Texas ban on materials depicting children merely observing sexual conduct. *Id.* at 592. Nonetheless, in the course of its opinion, the district court, relying on the *Ginsberg* case, stated that "[if] the statute were limited to prohibiting the depicting of minors actually engaged in sexual conduct, . . . the Court would likely have no hesitation in declaring its constitutionality." *Id.* Also overlooked by respondent, is that following the decision in *Graham*, the Texas Legislature, apparently relying on the quoted language, enacted a new statute similar to that of New York. *See* Tex. Penal Code Ann. Tit. 9, §43.25(e) (Vernon).*

Having unpersuasively argued that there is no question calling for review, respondent takes a different tack and argues that the decision below may be sustained because a state court may afford greater rights under the First

* Respondent, in the third footnote on page 11, also refers to the lower court opinion in *St. Martin's Press, Inc.* v. *Carey*, 440 F.Supp. 1196 (S.D.N.Y. 1977) which declared the New York statute unconstitutional, but was reversed on appeal because of the absence of a case or controversy, 605 F.2d 41 (2d Cir. 1979). The district court's conclusion was based on its opinion that the New York Legislature could not regulate the abuse of children outside New York, committed before the effective date of the statute (440 F.Supp. at 1205). Notably, as pointed out in the petition, the New York Court of Appeals never passed on this argument and respondent does not offer it as a reason to deny certiorari. Indeed, to the extent that this Court finds that the district court view in *St. Martin's Press* case has any merit, the New York Court of Appeals must be given an opportunity to decide whether to construe its statute accordingly.

Amendment than would this Court. *Brief in Opposition*: 12. This simply is not the law: "a state may not impose such greater restrictions as a matter of federal constitutional law when this Court specifically refrains from imposing them." *Oregon* v. *Haas,* 420 U.S. 714, 719 (1975). Of course, a state court may interpret a state constitution as affording rights beyond those guaranteed by the Federal Constitution. *Id.* at 719n. Here, however, the New York Court of Appeals never mentioned the New York State Constitution, but throughout its opinion referred exclusively to the First Amendment. Thus, there can be no doubt that the decision below rests exclusively on the First Amendment and is not based on a holding giving greater rights under the State Constitution.

Finally, also at page 12, respondent somewhat enigmatically argues that certiorari should be denied because, if the petition were granted, affirmance would be required and thus "render unconstitutional these 19 [similar] laws, which may yet be upheld *in their own state*" (emphasis in original).* To the extent it makes any sense, this argument is premised on the assumption that this Court will agree with the New York Court of Appeals. However, for the reasons submitted in the petition and this reply this premise is far from clear. New York, and these other 19 states with similar statutes, are entitled to a definitive ruling by this Court.

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* Of course, even though a denial of certiorari is not an opinion on the merits, if certiorari is denied here, other state courts may view the decision below as definitive.

Conclusion

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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August 25, 1981

MOTION FILED
SEP 11 1981

No. 81-55

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

THE PEOPLE OF THE STATE OF NEW YORK,

Petitioner,

—against—

PAUL IRA FERBER,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE NEW YORK STATE COURT OF APPEALS

MOTION FOR LEAVE TO FILE A BRIEF *AMICUS CURIAE* AND *AMICUS CURIAE* BRIEF

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MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE* AND BRIEF *AMICUS CURIAE*

Covenant House hereby respectfully moves for leave to file the attached brief *amicus curiae* in support of The People of the State of New York's petition for certiorari in this case. The consent of the attorney for the petitioner has been obtained. The consent of the attorney for the respondent was requested but refused.

Interest of Covenant House

Covenant House is a New York not-for-profit corporation. Its principal activity has always been child care, first in group homes providing long-term care to small groups of homeless children, then, beginning in 1977, extending temporary shelter, care and counselling to thousands of run-

away or destitute children annually (7,360 new cases in 1980 alone). Covenant House's Under 21 crisis shelter, located in the Times Square area of Manhattan, includes a fully staffed medical clinic, a public school, a battery of professional social workers, a large child-care staff, a cafeteria serving three meals a day, and accommodations for approximately 200 children per night.

The location of the Under 21 center and its no-strings open-intake policy have brought Covenant House into constant confrontation with the sex industry that dominates the Times Square landscape and feeds upon the desperation of the young people attracted there. The majority of the children housed at Under 21 have been sexually exploited at least in the sense of having been forced to trade sex for food or shelter. A significant minority has been used in the production of child pornography. As Covenant House is one of a tiny number of organizations with significant experience in caring for sexually exploited children, it has the obligation to represent the interests of those children before this Court in a case as critical as this for their future.

Importance of Case for Sexually Exploited Children

Because this case arose as a criminal action, its issues have been largely framed as a clash between the power of the state and the purported First Amendment rights of the respondent. Left out of the analysis—because of the incapacity of the parties and the Court below to understand the scope of the problem—has been a serious consideration of the interests of the victims of the "kiddie porn" industry.

As outlined in the attached brief, those interests are not tangential to this case—they are fundamental. The distri-

bution of child pornography not only seriously extends and deepens the injuries to children from the production of such material, but it causes, too, harms completely distinct from the original sexual exploitation. New York was fully justified, based on the privacy interest of the children involved, in prohibiting the distribution of certain specifically defined varieties of child pornography.

Covenant House in its attached brief brings to this case a consideration of this central privacy issue, and attempts in factually oriented appendices to outline the wealth of material bearing on the subject of sexual exploitation of children. Analysis is included, as well, of the criminal nature of distributing "kiddie porn" on the basis of the illegality of its productior under state and federal law.

Far more important than acceptance of the attached brief, however, is serious consideration by the Court of the petition for certiorari. The constitutional guidelines for meaningful regulation of sexual exploitation of children in the pornography industry are at this time so murky as to be useless. Other states, many with statutes similar to New York's, and the federal government are desperate for concrete guidance. Thousands of children, finally, have paid and will pay the price for such confusion—selling their most private personal dignity, then living with the consequences of knowing the sale is endlessly available for public viewing. It is on their behalf that Covenant House respectfully submits this attached brief and begs the Court to grant the writ of certiorari.

Respectfully submitted,

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Questions Presented

1. Can a state act to protect the privacy of children who are being exhibited in specifically defined, graphic sexual activity by banning the distribution of material containing such exhibitions of children?

2. Does the state's interest in suppressing the criminal conduct of using children in specifically defined, graphic sexual performances justify the prohibition of promoting such performances, where such promotion extends and deepens the harms of the underlying crime?

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Petitioner,

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PAUL IRA FERBER,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE NEW YORK STATE COURT OF APPEALS

BRIEF *AMICUS CURIAE*

Statement of Interest

As more fully explained in the accompanying motion, Covenant House is a non-profit organization dedicated to the shelter and care of destitute children. Most of the thousands of children in its care each year have been sexually exploited, many have been involved in pornography. Covenant House is before the Court as amicus curiae representing the victims of the "kiddie porn" industry.

SUMMARY OF ARGUMENT

The distribution or exhibition of material depicting children engaged in such graphic sexual activity as masturbation, normal or deviate sexual intercourse, sado-masochistic

abuse or bestiality causes severe harms to the children involved. New York, in Penal Law § 263.15,* prohibited the promotion of specifically defined sexual performances by children in order to serve two vital state interests: (1) protection of the privacy of the children induced to participate in such performances; and (2) suppression of conduct that compounds the original crime of producing child pornography.

New York's assault on the sexual exploitation of children in no way dilutes First Amendment guarantees of free expression. Those guarantees do not permit the nonconsensual invasion of children's privacy through public display of their most intimate conduct. Nor does the First Amendment prevent the proscription of speech in furtherance of an illegal activity—here the federal and state crimes of producing child pornography. The harms from promoting even technically "non-obscene" child pornography far outweigh any political, social or intellectual benefit from such activity. Because children's sexual performances cannot be consensual in any meaningful sense, their exhibition involves none of the traditional rationale for protecting individual self-expression.

The majority decision below, overruling the trial and lower courts and invalidating New York Penal Law § 263.15, involves far more than one state's effort to protect its children from sexual exploitation. The validity of similar statutes in at least eighteen other states is seriously clouded, as is any possibility of effective protection of children nationally. In the midst of legal confusion and extraordinary danger to the young, this Court should in its discretion grant the petition for a writ of certiorari.

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* New York Penal Law § 263.15 is reprinted in Appendix G.

ARGUMENT

I.

Importance of the Case

The "peculiar vulnerability" of children, *Bellotti* v. *Baird*, 443 U.S. 622, 634 (1979) *(Bellotti II)*, is not mere popular prejudice; it is a certainty deeply embedded in history and legend—from Joseph's sale into Egyptian slavery, to the murder of the Princes in the Tower, to Smike's brutal persecution by Wackford Squeers in *Nicholas Nickleby*, to the poisoning of young children by their parents at Jonestown. In every age humanity has furnished a more than adequate supply of adults eager to exploit that vulnerability, while human ingenuity has continued to invent new tools and new rationalizations for the exploitation.

If the judiciary has had its share of triumphs in piercing those rationalizations, *see, e.g., In re Gault*, 387 U.S. 1 (1967); *Haley* v. *Ohio*, 332 U.S. 596 (1948), it has suffered some barbaric defeats as well. *See Child Labor Tax Case*, 259 U.S. 20 (1922); *Hammer* v. *Dagenhart*, 247 U.S. 251 (1918).[1] Among the latter must now be numbered the case at bar, in which the New York Court of Appeals fell victim

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[1] More outrageous examples are of course available:

> "Prior to the Victorian era the execution of a child was by no means unusual. For example, in 1801 a boy aged thirteen was publicly hanged for breaking into a house and stealing a spoon. In 1808 a girl aged seven was hanged at Lynn, and in 1831 a boy of nine was hanged at Chelmsford for having set fire to a house. Such practices undoubtedly were accepted, perhaps even enjoyed by the English public in general. They found support in the words not only of sitting judges, but also of oracles of the law such as Coke, Blackstone and Stephen. . . ." Christoph, *Capital Punishment and British Politics* 15 (1962).

Hammer v. *Dagenhart* was, of course, explicitly overruled in *United States* v. *Darby*, 312 U.S. 100, 117 (1941).

to the pieties offered by the newest class of child exploiters —the distributors of child pornography. With a myopic absolutism rivalling the exaltation of the "right of contact" over laborors' welfare in *Lochner* v. *New York*, 198 U.S. 45, 64 (1905), the Court of Appeals found that protection of children from even the grossest forms of sexual abuse and public humiliation must yield to "the freedom of speech" of pornography distributors.

The District Attorney for New York City has ably attacked this decision on its own terms in his Petition for a Writ of Certiorari. Yet so perverse is the approach of the Court of Appeals to this whole question that Covenant House believes this Court should disregard the narrow, categorical approach adopted below, and instead carefully consider what interests of *children*—and of society at large —are at stake in this controversy. Those interests include far more than the indirect suppression of sexual abuse; they encompass the most fundamental privacy rights, psychological well-being, and potential rehabilitation of the children involved. They include, too, the interest of the state in regulating conduct which promotes and extends criminal activity.

Consideration of these interests by this Court is vital not simply because of this case's pernicious implications for New York. Rather, similar statutes of eighteen other states regulating child pornography,[2] the children they protect, and the future of defendants tried under those statutes clearly hang in the balance.[3] Equally important, a decision by the Court in this case would substantially influence the

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[2] N.Y. Penal Law § 263.15, proscribed the distribution of materials which depicted children engaged in explicit sexual acts without insisting the material be obscene. For a list of similar state statutes see Appendix A.

[3] New York's law is the first such statute to be held unconstitutional by a state court. *See* note 7 *infra*.

approach of Congress and many state legislatures, who have been constrained in their response to this problem by the lack of clear guidance from this Court.[4] A more confined attack on the child pornography industry than that launched by New York is generally ineffective,[5] and it seems clear that Congress would be eager (absent fears of judicial disapproval) to adopt the New York model.[6] Only an authoritative resolution of the constitutional issues by this Court can allow the federal and state governments to act effectively and in concert against the abuses of the child pornography industry.

Other considerations equally compel a grant of certiorari in this case. The only two decisions issued by Federal Courts on the question presented are confusing and contradictory.[7] Even the few commentators are divided as well.[8]

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[4] Protection of Children Against Sexual Exploitation Act of 1977, 18 U.S.C. §§ 2251-2253 (Supp. III 1979), applies to distribution of child pornography only if the material is legally "obscene." For similar state statutes see Appendix A.

[5] Since the enactment of the federal statute against child pornography there have been very few prosecutions brought under its provisions, as evidenced by the absence of a single reported decision construing it. According to the United States Department of Justice, only thirteen indictments have been obtained under the "distribution" section of the 1977 federal act (18 U.S.C. § 2252 (a)(1), (2) (Supp. III 1979)); only one indictment, and no convictions, has been obtained under the "production" section of that act (18 U.S.C. § 2252(a)(1)(A), (2)(A) (Supp. III 1979)).

[6] *See* note 40 *infra*.

[7] *Graham* v. *Hill*, 444 F. Supp. 584, 592 (W.D. Tex. 1978) (a statute limited to prohibiting the depiction of minors actually engaged in sexual activity would be constitutional, without obscenity requirement); *St. Martin's Press, Inc.* v. *Carey*, 440 F. Supp. 1196, 1204-1206 (S.D.N.Y. 1977) (suppression of "arguably non-obscene" book under New York's Penal Law § 263.15 preliminarily enjoined, based on "serious" questions as to the statute's constitutionality), *rev'd on other grounds*, 605 F.2d 41 (2d Cir. 1979).

[8] *Compare*, Note, *Protection of Children from Use in Pornography*, 12 J. L. Ref. 295, 312-318 (1979) (regulation of distributors

This confusion is highlighted by the existence of two seemingly unrelated federal statutes—one forbidding conduct which would "promote" racketeering activity, 18 U.S.C. § 1952 (1976), the other proscribing the disclosure of the contents of any conversation which was the subject of an illegal wiretap, 18 U.S.C. § 2511(c) (1976). Each of those statutes penalizes speech which, like a film produced from the sexual abuse of a young child, is the fruit of criminal activity, and which extends the damage of the original crime.

Compared with the health and safety of thousands of children which this case so urgently involves, considerations of judicial economy can be only of secondary importance. Yet with the confusion pervading legal analysis of this issue—nowhere more evident than in the decision below—a decision by this Court in this case can only be of great service to jurists and legislators. If any order is to come to this cluttered corner of the law, this Court must bring it.

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of child pornography without obscenity requirement constitutional); *with* Note, *Child Pornography Legislation*, 17 J. Fam. L. 505 (1978-79) (unconstitutional) *and* Note, *Child Pornography: A New Role for the Obscenity Doctrine*, 1978 U. Ill. L. F. 711, 740-744 (unconstitutional). *See*, Comment, *Preying on Playgrounds: The Sexploitation of Children in Pornography and Prostitution*, 5 Pepperdine L.R. 809, 824-832 ("If the state can constitutionally protect a minor's welfare by restricting materials available to him or her, it follows that the state possesses authority to prohibit publication of sexually explicit materials which use minors as subjects." *Id.* at 831) None of these commentaries considers the impact of children's privacy rights on the First Amendment questions, nor the fact that photographing children engaged in sexual conduct is, unlike the photographing of adult sexual activity, illegal under federal law. *See* Emerson, *The Right of Privacy and Freedom of the Press*, 14 Harv. C.R.-C.L.L. Rev. 383 (1980).

II.

The State Has a Compelling Interest in Regulating the Distribution of Sexually Explicit Photographic Portrayals of Minors.

A. *The Production of Photographic Material Displaying Minors Engaged in Sexually Explicit Conduct Entails Serious Harm for the Child Participants.*

Informed members of the scientific community have described participation in "kiddie porn" to be "highly destructive to children," [9] "devastating," [10] and likely to produce "psychic trauma" and "[m]assive acute anxiety" for the children involved.[11] Just as it was impossible to be "scientifically certain" of the effects on young people of exposure to sexually graphic material, *Ginsberg* v. *New York*, 390 U.S. 629, 643 (1968), so now it cannot be proved beyond cavil what are the results of participation of youths in the production of such material. For the children there is no scientific certainty; but "the victim of sexual exploitation has to live the rest of his or her life with those memories of what pornography and deviation brings upon [him or her.]" [12]

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[9] Densen-Gerber & Hutchinson, *Developing Federal and State Legislation to Combat the Exploitation of Children in the Production of Pornography*. Reprint of unpublished article from the Journal of Legal Medicine, September 1977 (Institute of Law & Medicine, Division of Odyssey Institute, New York, N.Y.). For a full list of authorities treating the effects of sexual exploitation of children, see Appendix B.

[10] Weeks, *The Sexually Exploited Child*, 69 S. Med. J. 848, 850 (1976).

[11] Schoettle, *Child Exploitation: A Study of Child Pornography*, 19 J. Am. Acad. Child Psych. 289, 296 (1980) [hereinafter cited as *Child Exploitation*]; Schoettle, *Treatment of the Child Pornography Patient*, 137 Am. J. Psych. 1109, 1110 (1980).

[12] *Sexual Exploitation of Children, Hearings Before the Subcommittee on Crime of the House Committee on the Judiciary*, 95th Cong., 1st Sess. (hereinafter *Sexual Exploitation of Children I*), 62-63 (testimony of Inv. Lloyd H. Martin, L.A. Police Dep't).

That it is harmful for a young boy or girl to participate in masturbation, bestiality, sado-masochism, or other form of explicit sexual activity in front of a camera, for later public distribution, is simple common sense. New York and a vast majority of the states, as well as the federal government, have prohibited using children for that purpose.[13] As this Court only last term recognized that "a State may regulate the sexual behavior of minors" and may even "make sexual intercourse among teenagers a criminal act." *Michael M.* v. *Sonoma County Superior Court*, 101 S. Ct. 1200, 1206 n.8 (1981), & 1218 (Stevens, J., dissenting), the constitutionality of these enactments seems beyond serious doubt.

B. *Distribution and Exhibition of Sexually Explicit Photographs of Children Harms the Children Separately from Production of Such Material.*

Hopelessly forgotten in the opinion below, and in most of the extant commentaries,[14] are the wounds inflicted on children, not by the production of "kiddie porn," but by its subsequent *distribution* to third parties. Yet it is that damage, both separate from and an extension of the original sexual abuse, which is the fundamental justification for the New York law at issue.

Illicit sexual activity, however private and well-concealed, may provoke regret, even trauma in the memories of adults.[15] Child pornography, by comparison, is a "graphic

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[13] 18 U.S.C. § 2252 (Supp. III 1979) (The Protection of Children Against Sexual Exploitation Act of 1977); N.Y. Penal Law § 263.05 (McKinney 1980). For a complete list of other states' relevant statutes, see Appendix A.

[14] Note, *Child Pornography Legislation*, 17 J. Fam. L. 505 (1978-79); Note, *Child Pornography: A New Role for the Obscenity Doctrine*, 1978 U. Ill. L.F. 711. *But see* Note, *Protection of Children from Use in Pornography*, 12 J. L. Ref. 295, 301 (1979).

[15] The Reverend Dimmesdale in *The Scarlet Letter* is a remarkable, if perhaps unrepresentative example.

form of exhibitionism . . . [which] literally makes the child's body 'available' for anyone willing to pay the price anywhere in the world." [16] Damaging as the initial sexual abuse may be, "it is the *fear of exposure* and the tension of keeping the act secret that seem to have the most profound emotional repercussions." [17] The child photographed must live with this fear ceaselessly; unlike a prostitute, the child's sexual act cannot simply be forgotten or placed in perspective.[18] It is available to the public for constant reenactment. That availability means of course, perpetual insecurity for its victim: no rehabilitation, however complete, can shield the person exploited as a child from later public exposure and ridicule.[19] At least the sexual abuse involved in producing child pornography is an action limited in duration; distribution of it may be endless.

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[16] *Child Exploitation, supra* note 11, at 292.

[17] *Id.* (emphasis added). *See also* Burgess & Holmstrom, *Sexual Trauma of Children and Adolescents,* 10 Nursing Clinic N. Am. 551 (1975).

[18] "It was procedure to keep a blackmail photo file of each boy to avoid any squealing . . ." Gerald S. Richards, convicted for molesting a 10 year-old boy, filmed, processed and sold child pornography film, and sold the sexual services of his young male models. Sneed, *Father Teacher: Tangled Life of Child Pornographer, Chicago Tribune* (May, 1977), *reprinted in Protection of Children Against Sexual Exploitation, Hearings Before the Subcommittee to Investigate Juvenile Delinquency of the Senate Committee on the Judiciary,* 95th Cong., 1st Sess. 135-36 (1977).

[19] *See* L. Lovelace, *Ordeal* (1980). "But the world won't let Linda Lovelace rest in peace. Today I still can't go to a supermarket or a bus station or a high school basketball game without the risk—the whispers, the pointed fingers, the stampedes. . . . My particular concern is with my three-year-old son, who will someday have to learn that his mother was once this woman named Linda Lovelace." *Id.* at 1.

And: "Once I'm identified, our life falls apart. My husband has to leave his job to protect us and to move us somewhere else. Where I'm recognized again and again, I'm the target of freaks and degenerates." *Id.* at 261.

Ultimately, the problem of child pornography distribution distills to that of personal privacy:

> We cannot conceive of a more basic subject of privacy than the naked body. The desire to shield one's unclothed figure from the view of strangers, and particularly strangers of the opposite sex, is impelled by elementary self-respect and dignity. . . . We do not see how it can be argued that the searching of one's home deprives him of privacy, but the photographing of one's nude body, and the distribution of such photographs to strangers, does not.

York v. *Story*, 324 F.2d 450, 455 (9th Cir. 1963), *cert. denied*, 376 U.S. 939 (1964). Because of children's "inability to make critical decisions in an informed, mature manner," *Bellotti II*, 443 U.S. 622, 634 (1979), there can be little dispute that a child's participation in sexually exploitive conduct is presumptively nonconsensual.[20] *See Elkington* v. *Foust*, 618 P.2d 37 (Utah 1980). When a fifteen-year-old boy can purchase movies of himself in local pornography retail outlets,[21] it is the most pathetic optimism which asserts he has not been fundamentally, irreparably harmed.

C. *Violation of a Child's Most Basic Privacy Right—to the His Sexual Integrity—Has No Protetion Under the First Amendment.*

The distribution of films depicting normal or deviate sexual intercourse, bestiality, masturbation, or sado-masochistic abuse is obviously harmful to the children exhibited, and it occurs without even the slightest suggestion

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[20] For factual background on the question of children's "consent" to sexual exploitation, *see* Appendix C.

[21] The recent boast of a resident at Covenant House, quoted in article by G. Ruffini, New York *Post*, June 10, 1981, at 15.

of the children's consent.[22] In erecting its sand cathedral to the First Amendment, the New York Court of Appeals did not even consider the most critical interest of the children sacrificed on the altar: the *right to privacy.*

In *Katz* v. *United States,* 389 U.S. 347 (1967), this Court emphasized that "the protection of a person's *general* right to privacy—his right to be let alone by other people—is, like the protection of his property and of his very life, left largely to the law of the individual States." *Id.* at 350-51 (footnotes omitted).[23]

It was in the context of human sexuality that a constitutional "right to privacy" was first explicitly recognized by this Court, *Griswold* v. *Connecticut,* 381 U.S. 479 (1965), and indeed it has been in that context that the right has been most searchingly examined. *H.L.* v. *Matheson,* 101 *S. Ct.* 1164 (1981).; *Bellotti II,* 443 U.S. 622 (1979); *Bellotti* v. *Baird,* 428 U.S. 132 (1976) (Bellotti I); *Planned Parenthood of Central Missouri* v. *Danforth,* 428 U.S. 52 (1976). *Doe* v. *Bolton,* 410 U.S. 179 (1973); *Roe* v. *Wade,* 410 U.S. 113 (1973). The privacy interest in this case encompasses that of specifically defined sexual conduct and shielding such conduct from exhibition to strangers. *York* v. *Story,* 324 F.2d 450, 455 (9th Cir. 1963), *cert. denied,* 376 U.S. 939 (1964).[24] The children whom New York seeks to protect have been publicly displayed, in person and on film, in the midst of extremely graphic sexual activity.

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[22] *See* Appendix C.

[23] For background on the development of a "right of privacy" *see* Appendix D.

[24] In that case, circulation of photos taken of plaintiff at police station after told to undress held actionable as violation of state and constitutional privacy rights. *See Forts* v. *Ward,* 434 F. Supp. 946 (S.D.N.Y.), *rev'd on other grounds,* 566 F.2d 849 (2d Cir. 1977).

Here New York is trying simply to shield its children from such a disasterious sequence of exploitation by private individuals. This case thus squarely presents the question left open in *Cox Broadcasting Corp.* v. *Cohn*, 420 U.S. 469, 491 (1975): "whether the State may ever define and protect an area of privacy free from unwanted publicity . . . ." *See Time* v. *Hill*, 385 U.S. 374, 384 n.9 (1967). If a zone of personal privacy may in fact be defined, surely it would include sexual relations, or, at the very least, sexual relations involving children.[25] While, of course, "news" about such events might be privileged, photographic reproductions of the event, barring a consent the child is unable legally to give, would not.[26]

In 1977 this Court took two long strides toward recognizing a state's right to establish "an area of privacy" for its citizens. First, *Whalen* v. *Roe*, 429 U.S. 589 (1977), analyzed the "two different kinds of interests" that comprise the constitutional interest in "privacy": (1) "the individual interest in avoiding disclosure of personal matters"; and (2) "the interest in independence in making certain kinds of important decisions." *Id.* at 599-600 (footnotes omitted). The first interest is obviously at stake in this case, where New York's statute stands as the only effective deterrent to graphic disclosure of the most personal, most intimate details of the experiences of many sexually abused children. The statute more subtly protects the "independence" interest as well, for children used in production of

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[25] In *Carey* v. *Population Services Int'l*, 431 U.S. 678 (1977), this Court found that children under 16 had a constitutional privacy interest encompassing decisions regarding contraception. In that case a New York statute infringed the privacy interest of the children; here New York's statute seeks to *protect* that interest.

[26] *See* Restatement (Second) of Torts, § 652D, Comment h (1977) ("There may be some intimate details of her life, such as sexual relations, which even the actress is entitled to keep to herself.").

sexually explict material are generally deprived of any independent decision whether to permit its distribution.[37]

Close on the heels of *Whalen*, *Zacchini* v. *Scripps-Howard Broadcasting Co.*, 433 U.S. 562 (1977), considered one aspect of traditional privacy law in the context of First Amendment guarantees. Echoing the laudatory discussion of the "impressive credentials" of the "right of privacy" set forth in *Cox Broadcasting Corp.* v. *Cohn*, 420 U.S. at 487-89, the Court in *Zacchini* recognized a "right of publicity" protecting a performer from the broadcast of his entire act on a TV news show. Basing its decision on the importance of the performer's "proprietary interest" in his act, along the lines of copyright and patent law, the Court once again distinguished the "intrusion" and "private details" branches of privacy law, both from libel and "false light" actions and from the "right of publicity." 433 U.S. at 572-74. *See also* 433 U.S. at 581-582 (Powell, J., dissenting) (alluding to Prosser's "classic" article[38] on "right of privacy" tort suits).

Sexually exploited children are also part of "acts;" surely they, too, have a "proprietary interest" in films taken of them, without their consent, for "entertainment purposes." Beyond that, of course, the analogy to *Zacchini* breaks down, for children who have been sexually abused have no interest, as did Mr. Zacchini, 433 U.S. at 578, in gaining widespread publicity of their "performances." If the Court reverses the decision below, the public will lose access to the sight of those children in the midst of sexual intercourse, masturbation, bestiality, and sado-masochism.

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[37] *See* Appendix C. *See also McKenna* v. *Fargo*, 451 F. Supp. 1355, 1380-1381 (D.N.J. 1978) (applying *Whalen* v. *Roe* to psychological exams administered by Fire Department to applicants). *See* Emerson, *The Right of Privacy and Freedom of the Press*, 14 Harv. C.R.-C.L. L. Rev. 329 (1979).

[38] Prosser, *Privacy*, 48 Cal. L. Rev. 383 (1960).

The Court must decide whether that loss is worth the gain in protection of children's interest in personal privacy. It would seem a strange constitution, however, that permitted a seasoned circus performer to punish the broadcast of his act on local TV[29] yet prevented a twelve-year old boy from stopping a display of his sexual abuse in an adult movie theatre.

III.

Distribution of Child Pornography Is Part of a Course of Conduct Illegal From Its Inception, and so Subject to Criminal Penalties.

Material depicting explicit sexual conduct by children is unique among the various forms of current popular entertainment in that its very production is illegal—*whether or not* it is legally "obscene."[30] "Promotion" or distribution of such material is thus precisely the same as "promotion" of racketeering activity or the "distribution" of the contents of conversations that were illegally wiretapped.[31] The underlying activity is illegal; its promotion or distribution is simply the furtherance of crime. *See Smith* v. *Daily Mail Publishing Co.*, 443 U.S. 97, 105 (1979); *New York Times Co.* v. *United States*, 403 U.S. 713, 733-37 (1971) (White, J., concurring).

Distributors of defined material, moreover, know that what they sell was produced in violation of either state or

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[29] Or Mohammed Ali to punish Playgirl Magazine for publishing a "portrait" (not photograph) of him in the nude, *Ali* v. *Playgirl, Inc.*, 447 F. Supp. 723 (S.D.N.Y. 1978). *See also Meeropol* v. *Nizer*, 560 F.2d 1061 (2d Cir. 1977) (Louis Nizer's private letters entitled to copyright protection), *cert. denied*, 434 U.S. 1013 (1978). *See* Appendix D.

[30] 18 U.S.C. § 2252(a) (Supp. III 1979); N.Y. Penal Law § 263.05 (McKinney 1980).

[31] *See* p. 17 *infra*.

federal law, barring very special circumstances.[33] This is true whether the photos distributed appear in a scientific journal, a Broadway play, a Bible, or an adult bookstore.[34] Like the product of illegal child labor, such material should be rightly regarded as contraband and its purveyors punished.[34]

Where speech is directed at the furtherance of illegal activity, its constitutional protections are scanty at best. Thus, it is constitutional to prohibit speech containing price information on the basis only of a presumption that competition will be impaired. *United States* v. *Container Corp. of America*, 393 U.S. 333 (1969). It likewise violated no First Amendment rights when Congress and the states "strictly regulated public expression by issuers of and

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[33] Material produced prior to 1977 would arguably not be the product of criminal activity, though it seems likely that the child labor laws [*see* N.Y. Labor Law §§ 130-132 and similar provisions in other states, and 29 U.S.C. § 212 (child labor penalized), were technically applicable to nearly all child pornography production prior to that date. Material produced abroad involves other special problems not presented by this case. *See St. Martin's Press, Inc.* v. *Carey*, 605 F.2d 41, 44 (2d Cir. 1979) (holding *inter alia*, that the statute in question in this case would not apply to photographs of youths taken abroad prior to 1977. *Cf. United States* v. *McClain*, 545 F.2d 988 (5th Cir. 1977) (federal statute condemning the receipt of stolen goods may be applied to goods "stolen" in another country, even where technical questions of "theft" under foreign law are involved).

[34] "The invasion of privacy that is to be protected is equally complete and equally injurious, whether the motives by which the speaker or writer are actuated are, taken by themselves, culpable or not . . ." Warren & Brandeis, *The Right of Privacy*, 4 Harv. L. Rev. 193, 218 (1890). *See, e.g., Griffin* v. *Medical Society*, 7 Misc. 2d 549, 11 N.Y.S.2d 109 (Supreme Ct., N.Y. Co. 1939) where the Court upheld the application of New York's right to privacy law, N.Y. Civil Rights Law §§ 50, 51 (McKinney, 1980 & Supp. 1980), when surgeons published the case history of a patient in a medical journal without his consent.

[34] *See*, 18 U.S.C. § 1952 (1976) (proceeds from racketeering activity); 18 U.S.C. § 2511(c) (1976) (contents of illegally wiretapped conversation); 29 U.S.C. § 212 (1976) (fruits of child labor).

dealers in securities, profit-sharing 'coupons,' and 'trading stamps,' commanding what they must and must not publish and announce." *Paris Adult Theatre I* v. *Slaton*, 413 U.S. 49, 61-62 (1973); *Ohralik* v. *Ohio State Bar Ass'n*, 436 U.S. 447, 453 (1978). Outside strictly commercial contexts, speech which produces an agreement "to commit any offense against the United States" is punishable as felony conspiracy. 18 U.S.C. § 371 (1976). *See United States* v. *Edwards*, 458 F.2d 875 (5th Cir. 1972) (conspiracy statute constitutional), *cert. denied*, 409 U.S. 891 (1972). *See also New York Times Co.* v. *United States*, 403 U.S. 713, 733-40 (1971) (White, J., concurring).

Though the distribution of child pornography is an overwhelmingly commercial affair, and one often tinged with the hues of conspiracy, it is most closely analogous to the "promotion" of "racketeering" activities, 18 U.S.C. § 1952 (1976), and the "disclosure" of information obtained through wiretapping, 18 U.S.C. § 2511 (1976 & Supp. III 1979). It is critical to note that the latter section applies as well to disclosure of "the contents of any wire or oral communication, knowing or having reason to know that the information was obtained through the interception of a wire or oral communication in violation of this subsection." *Id.* § 2511(1)(c). A closer parallel to the distributor of juvenile sexual performances, who know that their contents offend the criteria of New York and federal law, is not possible. Both the anti-wiretapping and anti-racketeering statutes have withstood constitutional challenges based on the First Amendment. *See, e.g., United States* v. *Cerone*, 452 F.2d 274 (7th Cir. 1971) (gambling statute), *cert. denied*, 405 U.S. 964 (1972); *United States* v. *Becker*, 334 F. Supp. 546 (S.D.N.Y. 1971) (anti-wiretapping statute). *See also United States* v. *Nardello*, 393 U.S. 286 (1968) (construing and explaining anti-racketeering provisions).

Though the harms to the children involved are distinct at the production and distribution phases of child pornography, the system of sexual exploitation is all of a piece. The enormous annual production of child pornography is made possible only because a huge distribution network insures broad marketing capacity and almost complete anonymity for the producers.[35] The harm to the children involved, likewise, is as severe as it is only because of a broad public exposure, through distributors, of the minor's sexual conduct. Because that public exposure may well be the worst of the harms the sexual exploitation process inflicts on minors, and because of the extraordinary anonymity afforded to the producers of "kiddie porn" by its distributors, it is perverse to imagine that a focus only on production has any hope of success. New York was thus right to adopt a multi-pronged assault on the child pornography industry, capable of putting substantial pressure on its most crucial link.[36]

IV.

Sexually Explicit Photography Is "Speech" Only in a Limited Sense, Which Permits Its Regulation for the Benefit of the Performers.

Challenging as it does so many facile categories of First Amendment adjudication, this case perhaps affords the Court a chance to look again carefully at the meaning of the words "speech" and "press" in the Constitution. It is, of course, beyond question that motion pictures and live theatre are "speech" for purposes of the First Amendment.

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[35] *See* Guio *et al., Child Victimization: Pornography and Prostitution*, 3 J. Crime & Just. 65 (1980). For a brief discussion of the structure of the pornography industry, *see* Appendix E.

[36] Most other states with child pornography statutes have adopted a similar, multi-pronged approach. *See* Appendix A.

Joseph Burstyn, Inc. v. *Wilson*, 343 U.S. 495 (1952). Yet it is also clear that the photographic recording of a young boy masturbating—without his free, mature consent—strains any conceivable definition of "speech" or even "press".

The strain is apparent in two ways. First, the child's lack of voluntary participation, at least under legal presumption, removes a critical aspect of protected "speech" —that it somehow expresses one's own, as opposed to one's master's, thoughts. Thus Justice Stewart could comment in his concurrence to *Ginsberg* v. *New York:* "I think a State may permissably determine that, at least in some precisely delineated areas, a child—like someone in a captive audience—is not possessed of that *full capacity for individual choice* which is the presupposition of First Amendment guarantees." 390 U.S. at 649-50 (emphasis added) (footnote omitted). Second, if the "speech" is regarded as that of the director or cameraman, it is obvious that its expression requires the complete *suppression* of self-expression—in the context of sexual abuse—of the child. *Cf. Ginsberg* v. *New York*, 390 U.S. at 649 (Stewart, J., concurring); *Kovacs* v. *Cooper*, 336 U.S. 77, 86 (1949) & 97 (Frankfurter, J., concurring) (sound amplification may be constitutionally regulated to protect "freedom of thought").

In the face of this tension it may be worth reconsidering whether child pornography can ever have any constitutional protection,[27] though not judged legally "obscene," for such material appears to be like "fighting words"—of "no essential part of any exposition of ideas, and . . . of such slight social values as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality." *Chaplinsky* v. *New Hamp-*

[27] *See* Appendix F.

shire, 315 U.S. 568, 572 (1942). It hardly seems possible that to call a policeman a "damned racketeer" may be punished as a crime, *id.* at 574, while sale of children's bodies receives constitutional baptism.

CONCLUSION

In 1977 Congress enacted the Protection of Children Against Sexual Exploitation Act of 1977,[38] having concluded, based on extensive hearings, that "child pornography and child prostitution have become highly organized, multimillion dollar industries that operate on a nationwide scale" and, further, "the use of children . . . as the subjects of pornographic materials is very harmful to both the children and the society as a whole."[39] In course of their consideration of this measure, both houses of Congress determined that the "obscenity" of pornographic materials depicting children should be irrelevant to the criminality of their distributors, an intention thwarted only by time pressures and fears of some that a court might hold such a law unconstitutional.[40]

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[38] 18 U.S.C. §§ 2251-2253 (Supp. III 1979).

[39] *Senate Committee on the Judiciary, Protection of Children Against Sexual Exploitation Act of 1977,* S. Rep. No. 438, 95th Cong., 1st Sess. 5 (1977).

[40] 123 Cong. Rec. H 11,472 (daily ed. Oct. 25, 1977) (vote, 358 to 54, to instruct House conferees to accept Senate version of act, which contained no obscenity requirement for prosecution of distributors). *See* 123 Cong. Rec. S 18,783 (daily ed. Nov. 4, 1977) (statement of Sen. Roth prior to final passage of act.) There is also evidence that the decision of California to require proof of "obscenity" for prosecution of distributors of child pornography was influenced by fears of constitutional problems. *See Obscenity and the Use of Minors in Pornographic Material,* Hearing, California Assembly Committee on Criminal Justice 173 (Oct. 31, 1977 and Nov. 22, 1977) (Statement of Committee Chmn. Keith L. Maddy: "If we go after the distributor then we suddenly face First Amendment problems. . . . [W]e are searching for . . . an answer to the First Amendment problem.").

Now those fears have proven correct, for New York's bolder effort to fight sexual exploitation of children in distribution of child pornography is threatened with collapse. Ignoring the privacy interests of the children put on display and the undeniably criminal nature of "kiddie porn" production, New York's highest court has lifted the ramparts of the First Amendment to forbidding heights—high enough both to shield child abusers and to prevent the rescue of their victims. Refusal of petitioner's request for certiorari in this case would prolong the chaotic arguments over its central issues. Worse, it would allow the irreparable injury and exploitation of thousands of children.

The petition for a writ of certiorari should be granted.

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APPENDIX A

State Statutes Directed Against Child Pornography

New York Penal Law §263.15 (McKinney 1980), the statute in controversy, proscribed the distribution of materials which depicted children engaged in explicit sexual acts without insisting the material be obscene. Thirteen other states enacted like provisions: Ariz. Rev. Stat. Ann. §§13-3508, -3551 to -3555 (1978 & Supp. 1981); Col. Rev. Stat. §18-6-403 (Supp. 1980); Del. Code Ann. tit. 11 §§1103, 1108-11110 (1979); Haw. Rev. Stat. §§707-750 to -751 (Supp. 1980); Ky. Rev. Stat. §§531.300 to .370 (Supp. 1980); La. Rev. Stat. Ann. §14:81.1 (West Supp. 1981); Miss. Code Ann. §§97-5-31 to -37 (Supp. 1980); Mont. Rev. Codes Ann. §45-5-625 (1979); N.J. Stat. Ann. §2C:24-4 (West Supp. 1981); R.I. Gen. Laws §§11-9-1 to -3 (Supp. 1980); Tex. Penal Code Ann. tit. 9 §§43.23, .25 (Vernon Supp. 1980); W. Va. Code §§61-8C-1 to -3 (Supp. 1980); Wis. Stat. Ann. §940.203 (West Supp. 1980).

Four states except material in which nudity was presented for artistic, literary, scientific, educational or political purposes: Mass. Ann. Laws ch. 272, §§29A, 30D, 31 (Michie/Law Co-op 1980); Mich. Comp. Laws Ann. §750.145c (Supp. 1981); 18 Pa. Cons. Stat. Ann. §6312 (Purdon Supp. 1981); S.D. Comp. Laws Ann. §§22-22-22 to -25 (1979).

One state excepts material that reflects bonafide scientific or educational research or a bonafide object of art, which is not related to purient interest: Okla. Stat. Ann. tit. 21 §§1021.1 to .3 (West Supp. 1980).

The Protection of Children Against Sexual Exploitation Act of 1977, 18 U.S.C. §§2251-2253 (Supp. III 1979), applies to distribution of child pornography only if the material is legally "obscene." Additionally, eighteen states prohibit the distribution of child pornography only if legally obscene:

Appendix A

Ala. Code §§13-7-203 to -238 (Supp. 1979); Ariz. Rev. Stat. Ann. §§13-3508, -3551 to -3555 (1978 & Supp. 1981); Ark. Stat. Ann. §§41-4201 to -4205 (Supp. 1981); Cal. Lab. Code §§1309.5 to .6; Cal. Penal Code §§311.2(b), 311.4 (West Supp. 1981); Conn. Gen. Stat. Ann. §§53a-196a to -196(b) (West Supp. 1981); Fla. Stat. Ann. §847.014 (West Supp. 1981); Ill. Ann. Stat. ch. 38, §11-20a (Smith-Hurd 1979); Ind. Code Ann. §§35-30-10.1-2 to -3, 35-42-4-4 (Burns 1979); Me. Rev. Stat. Ann. tit. 17, §§2921-2923 (Supp. 1980); Minn. Stat. Ann. §617.246 (West Supp. 1981); Neb. Rev. Stat. §§28-1463 to -1464 (1979); N.H. Rev. Stat. Ann. §§650:1-2 (Supp. 1979); Ohio Rev. Code Ann. §§2907.32.1, 2919.22 (Page Supp. 1981); Or. Rev. Stat. §§163.477 to .495 (1979); Tenn. Code Ann. §§39-1019, -1020, 50-707 to -717 (1977 & Supp. 1980); Tex. Penal Code Ann. tit. 9, §§43.23, .25 (Vernon Supp. 1980); Va. Code §§40.1-100(F), 18.2-374.1 (Supp. 1980); Wash. Rev. Code Ann. §§9.68A .010 to .900 (Supp. 1981).

Eight states prohibit the production, but not the distribution, of child pornography even if it is not legally obscene: Alaska Stat. §11.41.455 (1980); Ga. Code Ann. §§54-309.1, 26-9943a (Supp. 1980); Iowa Code Ann. §728.12 (West 1979); Kan. Stat. Ann. §21-3516 (Supp. 1980); Mo. Ann. Stat. §568.060 (Vernon 1979); Nev. Rev. Stat. §§200.501, 5011(79) .509 (1980); N.M. Stat. Ann. §30-6-1 (Supp. 1980); Utah Code Ann. §§76-10-1206.5 (Supp. 1979).

Five states, finally, prohibit the production, but not the distribution of child pornography, if it is legally obscene: Md. Ann. Code art. 27 §419A (Supp. 1980); N.C. Gen. Stat. §14-190.6 (Supp. 1979); N.D. Cent. Code §§12.1-27.1-02, -03 (1976 & Supp. 1979); S.C. Code §§16-15-380, 16-15-440 (Supp. 1980); Wyo. Stat. §14-3-102 (1978).

APPENDIX B

Effects of Sexual Exploitation of Children

The academic literature concerning the sexual abuse of children has recently burgeoned. Where "[p]sychiatrists in the past have erred in the direction of ascribing to childhood fantasy real cases of sexual assault upon children," Peters, *Children Who Are Victims of Sexual Assault*, 30 Am. J. Psychotherapy, 398, 420 (1976), the subject is no longer professionally taboo. The following is a representative sample of the recent books and articles bearing on the effects of sexual exploitation on the child victims.

I. Professional Studies

A. Burgess & L. Holmstrom, *Accessory-to-Sex: Pressure, Sex and Secrecy*, in Burgess *et al.*, Sexual Assault of Children and Adolescents 85, 94 (1978) (Effects of nonconsensual sexual relations noted include "changes in sleep patterns" and "early prostitution in mid-adolescence or before, early access to drugs or alcohol, poor school performance, decrease in physical health status, apathy or listlessness, and sexual disfunction. . . .").

Burgess & Holmstrom, *Sexual Trauma of Children and Adolescents*, 10 Nursing Clinic N. Am., 551 (1975).

DeFrancis, Vincent. *Protecting the Child Victim of Sex Crimes Committed by Adults* (Amer. Humane Assoc. 1969) (The seminal work in exposing the scope of sexual abuse and its consequences; emotional damage found to have occurred in two-thirds of child victims surveyed, severe emotional damage in 14% of the victims. Pg. 169)

D. Finkelhor, *Sexually Victimized Children* (1979) (experiences of sexual abuse "highly traumatic"; two-thirds of children told *no one* about the experience, *id.* at 66-67).

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Greenberg, *The Epidemology of Childhood Sexual Abuse*, 8 Pediatric Annals 289, 297 (1978) (sexual relations with adult parent "an overwhelmingly painful, traumatic experience" for children).

Herjanic & Wilbois, *Sexual Abuse of Children*, 239 J. Am. Med. A. 331, 333 (1978). ("Often the child is more disturbed by the reaction that the behavior [sexual abuse] brings forth than from the sexual activity itself.").

Jaffe, *Sexual Abuse of Children*, 129 Am. J. Diseases of Children 689, 691 (1975) ("Our data suggest that sexual abuse has relatively low but significant physical morbidity.").

R. & H. Kempe, *Child Abuse* (1978) ("We believe *all* sexual exploitation is harmful." *Id.* at 56).

Lewis & Sarrell, *Some Psychological Aspects of Seduction, Incest, and Rape in Childhood*, 8 J. Am. Acad. Child Psych., 606, 618 (1969) ("Chronic anxiety . . . may be experienced when there are repeated experiences of an associated nature, all tending to interfere with the resolution of developmental tasks and each making the child more vulnerable. . . .").

Nelson, *Gonorrhea in Preschool and School-Aged Children*, 236 J. Am. Med. A. 1359, 1364 (1976) ("Gonorrhea is a rather common infection in prepubertal children. . . .").

Schultz, *The Child Sex Victim: Social, Psychological and Legal Perspectives*, 52 Child Welfare 147, 150 (1973) ("By far the greatest potential damage to the child's personality is caused by society and the victim's parents. . . .").

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L. Schultz, *Kiddie Porn: A Social Policy Analysis* (U. W. Va. 1977).

Sgroi, *Pediatric-Gonorrhea Beyond Infancy*, 8 Pediatric Annals 326, 327 (1979) (12.2 per 100,000 children aged 4 to 12 infected with gonorrhea).

Shamroy, *A Perspective on Childhood Sexual Abuse*, 25 Social Work 128, 131 (1980) (discusses the "psychosocial trauma that the child [sexual assault victim] experiences in testifying in front of numerous strangers").

Summit & Kryso, *Sexual Abuse of Children: A Clinical Spectrum*, 48 Am. J. Orthopsychiatry 237, 239 (1978) ("The experience of the authors in the Los Angeles area indicates a much higher prevalence and much more significant mental health impact from sexual abuse than is commonly recognized.").

Tilelli, *et al., Sexual Abuse of Children*, 302 New Eng. J. Med. 319, 322 (1980). (seventeen percent of child victims of sexual offenses needed medical attention; also noted "a trend in these children toward persistent somatization, nightmares and phobias"). *See* Stechler, *Facing the Problem of the Sexually Abused Child*, 302 New Eng. J. Med. 348, 349 (1980). (criticizes the Tilelli article for its "absence of psychologic data" and deplores the "all too frequent omission from the health care system of consideration of psychological damage to sexually exploited children").

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Child Pornography: Its Related Causes and Control, Interim Report of Select Committee on Child Pornography, Texas House of Representatives (1978).

Obscenity and the Use of Minors in Pornographic Material: Hearing before California Assembly Committee on Criminal Justice (San Diego, October 31, 1977).

Sexual Exploitation of Children: A Report to the Illinois General Assembly by the Ill. Legislative Investigating Commission (1980).

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III. Popular Works

R. Geiser, *Hidden Victims* (1979) (The author, Chief Psychologist at the Nazareth Child Care Center in Boston, concludes, "It would seem sensible to attach child pornography on the grounds that it is abuse rather than on the murky grounds of obscenity. Most health professionals would agree that child sexual exploitation is child abuse." *Id.* at 118.).

S. Janus, *The Death of Innocence* (1981).

C. Linedecker, *Children in Chains* (1981).

F. Rush, *The Best Kept Secret: Sexual Abuse of Children* (1980).

APPENDIX C

Consent of Children to Participation in Child Pornography

Whether a child can "consent" to his or her participation in the production of child pornography has not been extensively explored by the academic community. The most direct consideration of the question has been given by Dr. David Finkelhor, author of *Sexually Victimized Children* (1979):

> "Can children give informed consent to sex with adults? It is fairly evident that they cannot. For one thing, children lack the information that is necessary to make an 'informed' decision about the matter. They are ignorant about sex and sexual relationships. It is not only that they may be unfamiliar with the mechanics of sex and reproduction. More importantly, they are generally unaware of the social meanings of sexuality. For example, they are unlikely to be aware of the rules and regulations surrounding sexual intimacy, and what it is supposed to signify. They are probably uninformed and inexperienced about what criteria to use in judging the acceptability of a sexual partner. They probably do not know much about the 'natural history' of sexual relationships, what course they will will take. And, finally, they have little way of knowing how other people are likely to react to the experience they are about to undertake, what likely consequences it will have for them in the future."

Finkelhor, *What's Wrong With Sex Between Adults and Children*, 49 Am. J. Orthopsychiatry 692, 694-95 (1974). Other scholars have independently corroborated the absence of children's "informed consent" in the actual functioning

of the child pornography industry. *See,* Guio, Burgess & Kelly, *Child Victimization: Pornography and Prostitution,* 3 J. Crime & Just. 65, 68 (1980) (physical abuse and blackmail); L. Schultz, *Kiddie Porn: A Social Policy Analysis* 15-18 (U. W. Va. 1977).

The record of Congressional hearings leading to the enactment of the Protection of Children Against Sexual Exploitation Act of 1977 (18 U.S.C. §§ 2251-2253 (Supp. III 1979) is replete with testimony concerning the manipulation and coercion of the young to produce "kiddie porn". *See Sexual Exploitation of Children I, supra* note 12; *Sexual Exploitation of Children, Hearings Before the Subcommittee on Education and Labor,* 95th Cong., 1st Sess. (1977) (hereinafter *Sexual Exploitation of Children II*); *Protection of Children Against Sexual Exploitation, Hearings Before the Subcommittee to Investigate Juvenile Delinquency of the Senate Committee on the Judiciary,* 95th Cong., 1st Sess. (1977) (hereinafter *Protection of Children Against Sexual Exploitation*). *See especially, Sexual Exploitation of Children II, supra* at 42-43 (lease, then sale of 9-year-old boy by parents to older man for sexual molestation) (testimony of Lloyd H. Martin, L.A. Police Dept.); *Id.* at 66-68 (identifying child pornography actors as: (1) "throwaways, . . . who are neglected and abused"; (2) the "children of parents involved in sexual industries" who are "as young as 6 years old"; and (3) the children of a "parent so [economically] desperate that he knowingly and willingly permits the child to be so abused") (statement of Joseph Freitas, Jr., San Francisco District Attorney); *Id.* at 112 ("I could continue to present case after case; a veritable litany of woes to support what has been claimed: That large numbers of American children are being coerced into performing sexual acts for pornographers.")

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(statement of Robin M. Lloyd, author of *For Money Or Love: Boy Prostitution in America*); *Id.* at 116 (kidnapping of 11-year-old boy in Texas for possible sale in Mexico to pornography producers) (testimony of Robin M. Lloyd); *Protection of Children Against Sexual Exploitation, supra* at 60 (camp in Michigan for "nice neighbor who the family trusted" to take child to be "tested" for use as pornographic model) (testimony of Michael Sneed, Chicago *Tribune* reporter).

Covenant House began its own work when Father Bruce Ritter gave shelter to a group of 10 children who had starred in a pornographic movie out of desperation for food and shelter. *Sexual Exploitation of Children II, supra* at 249-250.

Among the recent cases in which the Court has commented on the capacity of minors to give informed consent are *Parham* v. *J.R.*, 442 U.S. 584, 603 (1979); *Bellotti I*, 428 U.S. 132, 147 (1976); *Ginsberg* v. *New York*, 390 U.S. 629 (1966).

APPENDIX D

Background of General Right of Privacy

The "impressive credentials" [1] of a legal "right of privacy" are generally conceded to begin with the famous article of Samuel Warren and Louis Brandeis, *The Right of Privacy*.[2] The states have generally attempted to give full scope to those rights,[3] and the federal courts have enforced them as well. *See York* v. *Story*, 324 F.2d 450 (9th Cir. 1963), *cert. denied*, 376 U.S. 939 (1964); *Forts* v. *Ward*, 434 F. Supp. 946 (S.D.N.Y.), *rev'd on other grounds* 566 F.2d 849 (2d Cir. 1977); *Dietemann* v. *Time, Inc.*, 284 F. Supp. 925 (C.D. Cal. 1968), *aff'd*, 449 F.2d 245 (9th Cir. 1971).[4]

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[1] *Cox Broadcasting Corp.* v. *Cohn*, 420 U.S. 469, 489 (1975).

[2] 4 Harv. L. Rev. 193 (1890). *See Cox Broadcasting Corp.* v. *Cohn, supra*, 420 U.S. at 487-489.

[3] *See* W. Prosser, *Handbook of the Law of Torts*, §§ 117, 810-812 (4th Ed. 1971); Prosser, *Privacy*, 48 Cal. L. Rev. 383 (1960).

[4] *York* involved the taking and circulation of pictures of plaintiff in the nude by a police officer. *Dietemann* concerned the entry of a reporter under false pretense into plaintiff's house and the subsequent publishing of his photographs. Both Courts predicated liability both under state right-to-privacy common law and under 42 U.S.C. § 1983, as violations of a constitutional right to privacy. Use of § 1983 as a basis for remedying violations of the right to privacy are not generally favored except in "outrageous" circumstances. *Rosenberg* v. *Martin*, 478 F.2d 520 (2d Cir. 1973) *cert. denied*, 414 U.S. 872 (1973); *Baker* v. *Howard*, 419 F.2d 376 (9th Cir. 1969); *Mimms* v. *Philadelphia Newspaper, Inc.*, 352 F. Supp. 862, 865 (E.D. Pa. 1972). In *Forts* v. *Ward, supra*, the state was ordered, on the basis of § 1983, to desist from assigning male corrections officers to those parts of a woman's prison where they might view the inmates showering or dressing. Citing *York*, the Court held that the women had a constitutional right to privacy protecting them from such exposure to "Peeping Toms." 434 F. Supp. at 949.

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Though marked by "developing distinctions and nuances,"[5] the interests protected by at least three of the four "branches" of privacy law are relevant to the distribution of child pornography: (1) "intrusion" into the "private affairs or concerns" of another,[6] (2) "appropriation" of a name or likeness,[7] and (3) most importantly, publicity given to private details of "no legitimate concern" to the public.[8] The need for protection against the revelation of intimate personal facts (including photographs)[9] is rooted in the "mental pain and distress, far greater than could be inflicted by mere bodily injury" which can follow it.[10]

New York has enacted legislation that provides both criminal and civil remedies for the unauthorized publication of one's name or likeness (N.Y. Civil Rights Law §§ 50, 51 (McKinney 1980 & Supp. 1980)). It is unlikely that a child victimized by pornography could avail himself of such statutory remedies. There is substantial trauma in being a complaining witness, and perhaps significant danger given the criminal nature of the pornography industry. *See* Weiss & Berg, *supra* p. 6a (Appendix B).

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[5] *Zacchini* v. *Scripps-Howard Broadcasting Co.*, 433 U.S. 562, 571 (1977).

[6] *See* Restatement (Second) of Torts § 652B (1977), and cases cited in appendix.

[7] *See Id*, § 652C, and cases cited in appendix.

[8] *See Id*, § 652D, and cases cited in appendix; *McNally* v. *Pulitzer Pub. Co.*, 532 F.2d 69, 78 (8th Cir. 1976), *cert. denied*, 429 U.S. 855 (1976).

[9] *Id*, § 652D, Comment b, Illustrations 6 and 7.

[10] Warren & Brandeis, 4 Harv. L. Rev. at 196.

APPENDIX E

Structure of Pornography Industry

Of interest in examining the nature of the child pornography industry is the following material, which is not by any means an exhaustive list:

The Report of the Commission on Obscenity and Pornography 7-25, 83-168 (1970). ("Most large exploitation producers act as their own distributors and also distribute films for smaller companies. . . ." *Id.* at 96.). So huge has been the revolution in the pornography industry during the last decade that the Commission's findings that "full male nudity is virtually unknown," *id.* at 11, now seems quaint, while its omission of *any* discussion of child pornography is disturbing. *See id.* at 100-101, 136-142 ("The use of pre-pubescent children in stag films is almost nonexistent." *Id.* at 139.).

Barrett, *Inside the Mob's Smut Rackets,* 103 Readers' Digest 128 (Nov. 1973).

Burgess, *et al., Child Sex Initiation Rings,* 51 Am. J. Orthopsychiatry 110 (1973).

Denison, *Smut: The Mafia's Newest Racket,* 99 Readers' Digest 157-160 (Dec. 1971).

Denison, *"Sultan of Smut."* 107 Readers' Digest 105 (Nov. 1975).

Guio, *et al., Child Victimization: Pornography and Prostitution.* 3 J. Crime & Just. 65 (1980).

"Kiddie Porn" 60 Minutes. (Mimeographed) (transcript of CBS telecast of May 15, 1977).

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R. Lloyd, *For Money or Love: Boy Prostitution in America* (1977). The definitive popular description of sexual exploitation of young men.

Protection of Children Against Sexual Exploitation, Hearings Before the Subcommittee to Investigate Juvenile Delinquency of the Senate Committee on the Judiciary, 95th Cong., 1st Sess. (1977) (hereinafter *Protection of Children Against Sexual Exploitation*) *See especially* pp. 48-57 (Bernard Carey), 57-64 (George Bliss & Michael Sneed).

C. See, *Blue Money* (1974). An anecdotal view of the pornography industry.

Sexual Exploitation of Children, Hearings Before the Subcommittee on Crime of the House Committee on the Judiciary, 95th Cong., 1st Sess. (1977). *See especially* pp. 59-73 (Inv. Lloyd Martin, Los Angeles Police Dept.).

Sneed, *et al.*, Series of investigative articles appearing in *Chicago Tribune* May 15-18, 1977, reprinted in *Protection of Children Against Sexual Exploitation, supra* 9a (Appendix C) at 130-150. The most significant of the journalistic analyses of the "kiddie porn" industry.

APPENDIX F

In the course of the 1977 Congressional hearings on sexual exploitation of the young, the following exchange occurred among Congressman Ashbrook, Harold P. Fahringer, Esq. and Mr. Larry Flynt:

MR. ASHBROOK. . . . I guess I would direct this question to you, Mr. Flynt, but I guess in general to Mr. Fahringer too. You both seem to come down on nudity and talk in those terms. But if we could shift a minute, *is it your contention that explicit sexual acts by children,* whether in film or in print, *are protected constitutionally, and therefore,* the film and publication and *distribution is* both *a constitutional problem?*

MR. FAHRINGER. *No; I don't urge that.* What troubles me more about the law is when you get into the area of the gray situations, simulated. I can easily see how a very artistic film could be made that would suggest in no uncertain terms a young girl like Jody Foster in Taxi Driver having intercourse with a man that was an integral part of the story. I would hate to see those films sanitized to the degree that there can be none of that, not even a suggestion of sexual conduct, which very often plays a dynamic part in these things.

MR. ASHBROOK. That is why I used the word *"explicit." It is your contention that explicit sexual acts by children could come under the area of some protection?*

MR. FAHRINGER. *Yes; you have no trouble with that.*

MR. FLYNT. Congressman, I see that a little differently. I am an absolutist when it comes to the Constitution. I don't feel there should be any obscenity laws; they should all be repealed. The American public should be able to do or read whatever they want, make their own decisions.

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But when chidren come into it, that is where you have to draw the line, because you are violating someone's rights that cannot speak for themselves.

So my position only is what goes on between consenting adults. ***The minute a child is involved, regardless of the nature of the act, I don't think it even has to be obscene, as far as our definition of obscenity goes, that a violation of the law has taken place. . . .***

Sexual Exploitation of Children I, supra note 12 at 270. (emphasis added).

APPENDIX G

The Statute in Question

For the convenience of the Court we set forth here the statute in question, New York Penal Law Section 263.15; with footnotes and bracketed material cross referencing other sections of the Penal Law which define its applicable terms:

§263.15 *Promoting a Sexual Performance by a Child*

A person is guilty of promoting[1] a sexual performance[2] by a child when, knowing the character and content thereof, he produces, directs or promotes any performance[3] which includes sexual conduct *actual or simulated*[4] [*sexual intercourse, deviate sexual intercourse,*[5] *sexual beastiality, masturbation, sado-masochistic abuse,*[6] or *lewd exhibition of*

---

[1] "Promote" means to procure, manufacture, issue, sell, give, provide, lend, mail deliver transfer, transmute, publish, distribute, circulate, disseminate, present, exhibit or advertise, or to offer or agree to do the same. [§ 263.00(5)]

[2] "Sexual performance" means any performance or part thereof which includes sexual conduct [i.e., conduct described in bracketed material in text] by a child less than sixteen years of age. [§ 263.00(1)]

[3] "Performance" means any play, motion picture, photograph or dance. Performance also means any other visual representation exhibited before an audience. [§ 263.00(4)]

[4] *"Simulated"* means the explicit depiction of any of the conduct set forth in subdivision three of this section[4] which creates the appearance of such conduct *and* which exhibits any *uncovered portion of* the *breasts, genitals or buttocks.* [§ 263.00(6)]

[5] "Deviate sexual intercourse" means the conduct defined by subdivision two of section 130.00 of this chapter, [§ 263.00(7)] [as] "sexual conduct between persons not married to each other consisting of contact between the penis and the anus, the mouth and penis, or the mouth and the vulva". [§ 130.00(2)]

[6] "Sado-masochistic abuse" means the conduct defined in subdivision five of section 235.00 of this chapter, [§ 263.00(8)] [as] "flagellation or torture by or upon a person clad in undergarments, a mask or bizarre costume, or the condition of being fettered, bound or otherwise physically restrained on the part of one so clothed". [§ 235.20(5)]

the genitals **(§263.00(3))] by a child less than sixteen years of age.**

Promoting a sexual performance by a child is a class D felony. Added L. 1977, c. 910, §2. (Emphasis added.)

Certificate of Service

I hereby certify that on the 9th day of September, 1981, three (3) copies of the annexed motion for leave to file a brief *amicus curiae* and *amicus curiae* brief were mailed, postage prepaid, to:

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I further certify that all parties required to be served have been served.

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No. 81-55

Office - Supreme Court, U.S.
FILED
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ALEXANDER L. STEVAS,
CLERK

IN THE

Supreme Court of the United States

October Term, 1981

THE PEOPLE OF THE STATE OF NEW YORK,

Petitioner,

against

PAUL IRA FERBER,

Respondent.

On Writ of Certiorari to the New York State Court of Appeals

BRIEF AND APPENDICES FOR PETITIONER

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Question Presented

To prevent the abuse of children who are made to engage in sexual conduct, could the New York State Legislature, consistent with the First Amendment, prohibit the dissemination of non-obscene material which shows children engaged in such conduct?

The New York State Court of Appeals answered this question in the negative.

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No. 81-55

IN THE

Supreme Court of the United States

October Term, 1981

THE PEOPLE OF THE STATE OF NEW YORK,

Petitioner,

against

PAUL IRA FERBER,

Respondent.

On Writ of Certiorari to the New York State Court of Appeals

BRIEF FOR PETITIONER

The New York County District Attorney, on behalf of the People of the State of New York, seeks reversal of a judgment of the New York State Court of Appeals. By that judgment, the Court of Appeals, by a divided court (5-2), reversed a judgment of the New York State Supreme Court, Appellate Division, First Department, affirming respondent Paul Ira Ferber's conviction of Promoting a Sexual Performance by a Child (New York Penal Law §263.15).

Opinions Below

The opinion of the New York Court of Appeals (App. A, 1a-16a[1]) is reported at 52 N.Y.2d 674, 422 N.E.2d 523, 439 N.Y.S.2d 863 (1981). The Appellate Division's order affirming respondent's conviction without opinion (App. B, 17a-18a) is reported at 74 A.D.2d 558, 424 N.Y.S.2d 967 (1st Dept. 1980). The opinion of the trial judge denying respondent's motion to dismiss the indictment (App. C, 19a-28a) is reported at 96 Misc.2d 669, 409 N.Y.S.2d 632 (Sup. Ct., N.Y. Co., 1978).

Jurisdiction

The judgment of the New York Court of Appeals was entered on May 12, 1981. The petition for a writ of certiorari was filed on July 11, 1981, and this Court granted the petition on November 16, 1981. The jurisdiction of this Court is invoked under 28 U.S.C. §1257(3).

Constitutional and Statutory Provisions Involved

The constitutional and statutory provisions involved are set forth in Appendix I.

Statement of the Case

On March 2, 1978, respondent Paul Ira Ferber, the owner of a Manhattan bookstore specializing in pornography, sold two films to an undercover police officer. The films are devoted almost exclusively to depicting young

1. References to appendices A, B and C are to the appendices to the petition for a writ of certiorari. References to Appendices I and II are to the appendices to this brief.

boys masturbating. The first film shows a naked boy lying face down on a bed, rubbing against the bed. After a while, the boy turns over onto his back and masturbates twice to ejaculation. Then, lying on his side, he places a dildo between his buttocks as if to insert it into his anus.

The second film shows a naked young boy masturbating to ejaculation and inserting a dildo into his anus. The second film also includes scenes of other naked boys, including some no older than seven or eight years of age, jumping, sitting and reclining on a mattress. In addition, these boys are engaged in solo and mutual masturbation and in conduct suggesting oral-genital contact. At the end of the second film, the main child performer dresses very slowly, then picks up what appears to be United States currency and holds it toward the camera.

Respondent was indicted on two counts each of Promoting an Obscene Sexual Performance by a Child (New York Penal Law §263.10) and Promoting a Sexual Performance by a Child (New York Penal Law §263.15). He moved to dismiss the indictment, arguing that Section 263.15 is overbroad in that it prohibits promotion of non-obscene materials, which are protected by the First Amendment. Respondent's motion to dismiss the indictment was denied in an opinion by Justice Irving Lang of the New York State Supreme Court, 96 Misc.2d 669, 409 N.Y.S.2d 632 (App. C). After the trial, at which the two films were exhibited to the jury, respondent was acquitted of the two counts of Promoting an Obscene Sexual Performance by a Child (Penal Law §263.10) but found guilty of the two counts of Promoting a Sexual Performance by a Child,

which did not require proof that the films were obscene (Penal Law §263.15).

Respondent's conviction was affirmed without opinion by the Appellate Division of the New York State Supreme Court. 74 A.D.2d 558, 424 N.Y.S.2d 967 (App. B).

On appeal to the New York Court of Appeals, respondent again argued that Section 263.15 is overbroad because it makes criminal the promotion of material which is not obscene. Holding that Section 263.15 violated the First Amendment, the New York Court of Appeals reversed and dismissed the indictment.

The Judgment Below

At the outset of its per curiam opinion, the New York Court of Appeals stated that, although it would ordinarily "interpret a statute so as to avoid constitutional infirmities, if at all possible" (App. A, at 3a), it could not read Section 263.15 in a limited way. More specifically, the court found it impossible "to save Section 263.15 by limiting its application to those who promote obscene performances" (App. A, at 3a). That limiting construction was not possible because another section, Section 263.10, makes it a crime to promote an obscene sexual performance by a child; thus, there was no doubt that the New York Legislature intended that Section 263.15 encompass sexual conduct by children in performances which are not obscene (App. A, at 3a-4a). This refusal to consider any other limiting construction makes it clear that the New York Court of Appeals, accepting the argument of respondent (*see* Appellant's Brief to the Court of Appeals, pp. 15-26), reached the conclusion

that the First Amendment precludes a state from prohibiting the promotion of a performance in which a child engages in sexual conduct unless the performance is obscene.

The court went on to hold, in addition, that even if the state's interest in protecting children from sexual abuse through exploitation by commercial interests were sufficiently compelling to justify a prohibition on the dissemination of performances which are not obscene, the New York statute would still be inconsistent with the First Amendment. This was so because the legislation is "strikingly underinclusive," in that it prohibits promotion of sexual performances, but does not bar the promotion of films, books or plays the production of which involves a child's performance of a dangerous stunt or his participation in any of the other numerous activities which the Legislature has determined are dangerous to the health or well-being of child employees or employees generally (App. A, at 5a-6a). According to the court, "the statute discriminates against films and other visual portrayals of nonobscene adolescent sex solely on the basis of their content" (App. A, at 6a), and cannot be sustained because no justification is shown for protecting children from sexual abuse and not all other possible dangers (*id.*).

Combining the two rationales for its decision at the conclusion of the majority opinion, the court summed up its holding:

> We merely hold that those who present plays, films and books portraying adolescents cannot be singled out for punishment simply because they deal with adolescent sex in a realistic but nonobscene manner (App. A, at 6a).

The court also mentioned that there was a question whether, to deter those who might exploit children in New York, the state has the power to punish the promotion in New York of materials which were produced elsewhere. The court, however, did not decide this question (App. A, at 5a).

In dissent, Judge Jasen, joined by Judge Gabrielli, emphasized that the Legislature was primarily concerned not with the morality of those who view the child's sexual performance, but with the effect of the sexual conduct on the children who were made to engage in that conduct (App. A, at 8a-9a). Judge Jasen pointed out that Section 263.15 does not purport to limit what may be said or what ideas may be expressed about childhood sexuality, but limits only the manner in which such ideas may be expressed (App. A, at 11a). In the dissenters' view, as well as that of the trial judge and apparently all five justices of the Appellate Division, this limited restriction on expression is justified by the state's compelling interest in preventing the sexual abuse and exploitation of the children (App. A, at 11a-14a). To the majority's conclusion that the statute is underinclusive, the dissenters replied that the Legislature could prohibit dissemination of only those products involving the most serious danger to children. According to the dissenters, the distinction drawn by the Legislature is justified by the unique danger of severe psychological and emotional injury to children who are exploited by being made to engage in sexual conduct to supply the market for child pornography (App. A, at 15a).

Summary of Argument

The production and dissemination of films, magazines, and other materials showing children as young as three years old engaged in virtually every type of sexual activity has become a major industry. Children who are forced by adults to perform sexual acts during the production of child pornography, like children subjected to any other form of sexual abuse, suffer profound physical and, especially, psychological injury, the full extent of which has only recently become appreciated by the scientific and medical professions.

New York has made it a crime to abuse children by forcing them to perform sexually. To discourage the sexual abuse of children, New York has, like nineteen of her sister states, also prohibited the dissemination of the materials which depict sexual conduct of children, regardless of whether the materials are obscene in the legal sense. The New York Court of Appeals in this case struck down that prohibition, holding that unless the materials are obscene the dissemination of child pornography is absolutely protected by the First Amendment.

The court's overly simplistic First Amendment analysis was faulty. Speech may be regulated to promote a compelling state interest, if there is no effective and less restrictive alternative. New York's statutory ban on the dissemination of materials depicting the sexual abuse of children was designed to combat a serious threat to the welfare of the state's children by eliminating the economic incentive for the sexual abuse, and thus beyond question pro-

motes a compelling state interest. Further, there is no effective alternative to the ban on dissemination. A direct prohibition on the actual abuse of children will not, by itself, prevent the sexual exploitation of children. Nor would children be adequately protected if the dissemination of obscene materials alone were prohibited. The obstacles to successful prosecution inherent in the legal definition of obscenity are so great that obscenity convictions are extremely difficult to obtain. A ban directed only at the sale of obscene materials thus would not effectively deter traffic in materials depicting sexual conduct of children, just as traditional obscenity statutes have failed to deter traffic in other types of obscene material. Further, even if obscene works could be forced out of the market place, the protection for children would still be inadequate; a sexually abused child suffers the same trauma regardless of whether the work which contains the depiction of his sexual performance is legally obscene.

The New York Court of Appeals, in an alternative holding, also determined that the ban on dissemination was unconstitutionally "underinclusive" because the only danger to child performers addressed by the statute is the danger of sexual abuse. Again, however, the court's analysis was faulty; nothing in the First Amendment prevents a state from seeking to eliminate a single pressing threat to child performers while leaving other types of problems, if any, to different legislation. Finally, there is no merit to the court's suggestion that, because materials made outside New York fall within the scope of its ban on dissemination, the statute might arguably be beyond the police power of the state.

POINT

New York's prohibition of the dissemination of non-obscene materials showing the sexual conduct of children furthers the State's compelling interest in protecting children from sexual abuse, in a manner no more restrictive of speech than is necessary to further that interest.

Introduction

In the late 1970's, it was brought to the attention of the American public that pornographers were exploiting children by making them perform sexual acts before cameras and live audiences. To protect children from this abuse, the New York Legislature enacted Article 263 of the Penal Law.

Section 263.05 prohibits employing, inducing, authorizing or permitting children under the age of sixteen to engage in sexual conduct during a performance. Believing that this direct ban on use would not effectively prevent the abuse of children, the Legislature also enacted Section 263.15. That section prohibits the knowing dissemination of materials, both obscene and non-obscene, showing children engaged in sexual conduct.[2] Finally, the Legislature, concerned that there might be a successful challenge to a ban on the dissemination of non-obscene materials, enacted Section 263.10. That section bans the knowing dissemina-

2. New York Penal Law Section 263.15 makes it a crime knowingly to "promote" materials depicting sexual conduct of children. " 'Promote' means to procure, manufacture, issue, sell, give, provide, lend, mail, deliver, transfer, transmute, publish, distribute, circulate, disseminate, present, exhibit or advertise, or to offer or agree to do the same." N.Y. Penal Law §263.00(5). For simplicity, throughout this brief we characterize Section 263.15 as a dissemination statute.

tion only of obscene materials showing the sexual conduct of children under the age of sixteen.

The Legislature's concern was well founded. In this case, the New York Court of Appeals held that only the dissemination of obscene materials can be prohibited; thus, Section 263.15 was declared unconstitutional because it prohibits the dissemination of non-obscene materials as well.

The Court of Appeals was mistaken. Section 263.15, the broad dissemination statute, is premised on the sound idea that the state can properly forbid distribution of materials produced in a certain manner if the state has properly prohibited that manner of production. Accordingly, to demonstrate the constitutionality of the entire statutory scheme, it is necessary to examine the ban on the use of children in producing the sexual performances. Further examination will demonstrate that the prohibition in Section 263.15 of the dissemination of both obscene and non-obscene materials is constitutional: it is the least restrictive means of furthering the compelling state interest in protecting children from sexual abuse.

The Court of Appeals, in the alternative, held that the dissemination statute was "underinclusive" because the Legislature did not prohibit the dissemination of materials showing child performers engaged in other, non-sexual, dangerous activity. Analysis of this holding reveals that the dissemination statute is not unconstitutionally underinclusive. The Legislature had valid reasons for dealing with the problems of sexual abuse, while leaving to existing statutes or future legislation, if necessary, the problem of other dangers to performing children.

Finally, the court below questioned, but did not decide, whether the State of New York can prohibit the dissemination in New York of materials depicting the sexual abuse of children, if that abuse did not occur in New York. Examination of this question reveals that the State of New York has more than a sufficient interest in banning the dissemination of such materials in New York.

(A) The prohibition against using children by having them engage in sexual conduct before a camera or live audience is fully justified by the compelling state interest in protecting children.

This Court has recognized that a state has a compelling, indeed a transcendent, interest in protecting its children. *Ginsberg* v. *New York*, 390 U.S. 629, 640 (1968), *quoting with approval People* v. *Kahan*, 15 N.Y. 2d 311, 312, 206 N.E. 2d 333, 334, 258 N.Y.S. 2d 391, 392 (1965) (Fuld, J., concurring); *Prince* v. *Massachusetts*, 321 U.S. 158, 165 (1944). As persuasively argued by Judge Jasen in dissent below (App. A, at 10a), Section 263.05 is directed at conduct of a kind which the State is entitled to prohibit, namely, the actual sexual abuse which is involved in using a child in a sexual performance. *See United States* v. *O'Brien*, 391 U.S. 367, 376-77 (1968); *see also People* v. *Folk*, 109 Misc.2d 738, 740-42, 440 N.Y.S. 2d 984, 986-87 (Sup. Ct., N.Y. Co., 1981). Moreover, even if characterized as a direct regulation of speech, Section 263.05 is constitutional, because it furthers a transcendent state interest. *See First National Bank of Boston* v. *Bellotti*, 435 U.S. 765, 786 (1978); *Miller* v. *California*, 413 U.S. 15, 18-19 (1973).

Whether construed as a regulation of conduct or of speech, or both, the statute is constitutional only if it

restricts speech no more than is necessary to achieve the state interest. *United States* v. *O'Brien*, 391 U.S. at 377; *First National Bank of Boston* v. *Bellotti*, 435 U.S. at 786. Section 263.05 is not more restrictive than necessary: there is no less restrictive way to protect children from sexual abuse than by directly prohibiting that abuse. Indeed, respondent conceded below that Section 263.05 does not unduly restrict free speech. Appellant's Brief to the New York Court of Appeals, at 9-11. At the same time, there is no doubt that the Legislature enacted the statute in order to protect children from sexual exploitation and that the Legislature's concern was well founded.

That Penal Law Article 263 was enacted to protect children is plain from the legislative findings accompanying the enactment:

> [T]here has been a proliferation of exploitation of children as subjects in sexual performances. The care of children is a sacred trust and should not be abused by those who seek to profit through a commercial network based upon the exploitation of children. The public policy of the state demands the protection of children from exploitation through sexual performances. . . . Laws of New York, 1977, ch. 910, §1.[3]

3. In addition, the Legislature found

> the sale of these movies, magazines and photographs depicting the sexual conduct of children to be so abhorrent to the fabric of our society that it urges law enforcement officers to aggressively seek out and prosecute both the peddlers of children and the promoters of this filth by vigorously applying the sanctions contained in this act. Laws of New York, 1977, ch. 910, §1.

This statement is similar to one of the reasons for prohibiting obscenity. *See Miller* v. *California*, 413 U.S. at 24; *Paris Adult Theatre I* v. *Slaton*, 413 U.S. 49, 57-62 (1973). Since Article 263 also contains a ban on the dissemination of obscene materials and since child pornography has some of the attributes of obscenity, it is not surprising that this rationale is also advanced as a basis for the legislation. Nevertheless, the primary rationale, as expressed first by the Legislature, is the protection of children from sexual exploitation.

Based upon similar findings and after concluding that existing legislation did not effectively deal with this kind of abuse, forty-seven other legislatures, and the Congress, enacted legislation to combat the sexual abuse of children in the production of pornography.[4]

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4. In addition to New York, nineteen states have prohibited the dissemination of material depicting children engaged in sexual conduct regardless of whether the material is obscene. Ariz. Rev. Stat. Ann. §13-3553; Colo. Rev. Stat. §18-6-403(3)(b); Del. Code Ann. tit. 11, §§1108, 1109; Hawaii Rev. Stat. §707-751; Ky. Rev. Stat. §§531.320, 531.340-531.360; La. Rev. Stat. Ann. §14:81.1(A)(3); Me. Rev. Stat. Ann. tit. 17, §2923(1); Mass. Ann. Laws ch. 272, §29A; Mich. Comp Laws Ann. §750.145c(3); Miss. Code Ann. §97-5-33(4); Mont. Rev. Codes Ann. §45-5-625; N.J. Stat. Ann. §2C:24-4(b)(5); Okla. Stat. Ann. tit. 21, §1021.2; Pa. Cons. Stat. Ann. §6312(c); R.I. Gen. Laws §11-9-1.1; S.D. Codified Laws Ann. §22-22-24; Tex. Penal Code Ann. tit. 9, §43.25(e) (Vernon); W. Va. Code §61-8C-3; Wis. Stat. Ann. §940.203(4) (West). The Hawaii statute, Hawaii Rev. Stat. §707-751, has been held unconstitutional by a Hawaii trial court on the ground that it prohibits material which is not obscene. *State* v. *Shingaki*, Hawaii Circuit Court, First Circuit, Cr. No. 54385, April 27, 1981, slip opinion at 4. The state's appeal from this decision is currently pending before the Hawaii Supreme Court. Petitioner has found no other case construing any of these statutes.

Eleven states prohibit the dissemination of such material only if it is obscene. Ala. Code §13-7-231, 13-7-232; Ark. Stat. Ann. §41-4201; Cal. Penal Code §311.2(b) (Deering); Ill. Ann. Stat. ch. 38, §11-20a (b)(1) (Smith-Hurd); Ind. Code Ann. §35-30-10.1-2; Minn. Stat. Ann. §617.246(3) and (4); Neb. Rev. Stat. §28-1463(2); N.H. Rev. Stat. Ann. §650:2(II); Ohio Rev. Code Ann. §2907.321(A) (Anderson); Ore. Rev. Stat. §163.485; Wash. Rev. Code Ann. §9.68A.030. The federal statute also prohibits dissemination only if the material is obscene. 18 U.S.C. §2252(a). Three states prohibit dissemination only if the material is obscene as to minors. Conn. Gen. Stat. Ann. §53a-196b (West); Fla. Stat. Ann. §847.014(2)(b) (West); Va. Code §18.2-374.1(B)(4) and (5). Fourteen states prohibit only the use of minors in the production of the material. Alaska Stat. §11.41.455; Ga. Code Ann. §26-9943(a); Iowa Code Ann. §728.12 (West); Kan. Stat. Ann. §21-3516; Md. Crim. Law Code Ann. §419A; Mo. Ann. Stat. §568.060(1)(b); Nev. Rev. Stat. §200.509; N.M. Stat. Ann. §30-6-1; N.C. Gen. Stat. §14-190.6; N.D. Cent. Code Ann. §12.1-27.1-03(2); S.C. Code §16-15-380; Tenn. Code Ann. §39-1020; Utah Code Ann. §76-10-1206.5; Wyo. Stat. Ann. §14-3-102(a)(v)(E). *See generally* Shouvlin, *Preventing the Sexual Exploitation of Children: A Model Act*, 17 Wake Forest L. Rev. 535, 556 (1981).

The exploitation of children by making them perform sexual acts before a camera or a live audience is not a figment of the Legislature's imagination. Child pornography is a nationwide industry grossing more than 200 million dollars a year. That industry has produced the films in this case, which depict young boys masturbating to ejaculation and also depict a group of boys on a mattress, some no older than eight, fondling each other's genitals and simulating fellatio. These films are almost mild compared to other material readily available in the marketplace: young boys and girls, some no older than three years of age, are depicted engaged in intercourse, fellatio, cunnilingus, and sodomy with other children and adults and even in sex with animals.[5]

Surely, the New York Legislature could find that making children under the age of sixteen engage in sexual conduct[6] as subjects in child pornography constitutes sexual abuse and is physically, psychologically and emotionally

5. The child pornography industry is examined in Appendix II *infra*.

6. New York Penal Law Section 263.00(3) defines sexual conduct as meaning actual or simulated intercourse, deviate sexual intercourse (sodomy), masturbation, bestiality, sadomasochistic abuse (flagellation or torture) or lewd exhibition of the genitals. Simulated sexual conduct is defined as the explicit depiction of the above conduct which creates the appearance of that conduct and which exhibits any uncovered portion of the breasts, genitals or buttocks. New York Penal Law §263.00(6). By defining simulated sexual conduct to include the explicit depiction of the forbidden acts, accompanied by exposure of the breasts, genitals or buttocks, the Legislature intended to prohibit conduct which is clearly deleterious. In addition, it is sometimes difficult, if not impossible, to determine whether the depicted sexual act is real or simulated. For that reason, the State is justified in prohibiting simulated conduct of this kind, especially since there are alternatives to using a partly or wholly naked child in a pose which explicitly depicts sexual conduct. *See* pp. 24-25 *infra*.

harmful to the children involved. Significantly, such a finding need not be based upon accepted scientific fact; it is sufficient that the harmfulness of using children in pornography has not been scientifically disproved. *See Ginsberg* v. *New York*, 390 U.S. at 641. Still, despite the recency of child pornography as a major social issue, there is ample scientific support for this conclusion (*see* Appendix II *infra*). Given that support, there is no doubt that the Legislature could determine that sexual use constitutes a danger to the children involved, and thus, prohibit such use.

(B) A statute banning the dissemination of material depicting the unlawful sexual use of a child is justified fully by the compelling state interest in protecting children and the absence of any less restrictive alternative.

If the sexual abuse of children in the production of films, photographs and live performances is evil and can be prohibited, it would seem to follow logically that the products of that evil can also be prohibited. However, according to respondent and the court below, once that sexual abuse becomes visually memorialized, *e.g.*, on film, in a photograph or on videotape, then any statutory prohibition on its dissemination is aimed at the content of speech. The analysis continues: a prohibition based on content is constitutional only if the material involved falls within those specific categories of speech which this Court has held may be prohibited. Obscenity is the only one of these categories applicable to material depicting the sexual conduct of children; hence, the argument simply concludes that dissemination of this material may be prohibited only if the material is obscene.

Like most simple answers to complex questions, this one is wrong. This Court has never held that merely because speech does not fit into one of the enumerated categories of unprotected speech, it is absolutely protected under the First Amendment. Indeed, the Court has held the exact opposite: The right of free speech is not absolute. Speech may be prohibited provided that the prohibition furthers a compelling state interest and is the least restrictive alternative to achieve that interest. *Schad* v. *Borough of Mount Ephraim*, —— U.S. ——, 101 S.Ct. 2176, 2182-84 (1981); *First National Bank of Boston* v. *Bellotti*, 435 U.S. at 786; *Schneider* v. *State*, 308 U.S. 147, 161-65 (1939). *See* Tribe, American Constitutional Law, pp. 581-83, 602-06 (1978).[7] Thus, regardless of whether materials which are devoted to depicting the sexual abuse of children fit into any previously recognized category of unprotected speech, prohibiting dissemination of those materials does not violate the First Amendment if the "compelling state interest-less restrictive alternative" standard is satisfied. The standard is satisfied in the case of the prohibition on the dissemination of materials depicting the sexual abuse of children.

It is beyond cavil that protecting children is a compelling state interest. *See, e.g., Ginsberg* v. *New York*, 390 U.S. at 649. Equally beyond argument is that inherent in

7. This Court seems evenly divided over whether the state may justify its regulation of non-obscene sexually oriented materials under a less rigorous standard. *Compare Young v. American Mini Theatres, Inc.*, 427 U.S. 50, 63-71 (1976) (Stevens, J.) (plurality opinion), *with id.* at 73n.1 (Powell, J., concurring) and *id.* at 86 (Brennan, J., dissenting). However, it is unnecessary to resolve this question here, because a prohibition on the dissemination of materials showing the sexual conduct of children satisfies the "less restrictive alternative-compelling state interest" standard.

the production of materials depicting children engaged in sexual conduct is sexual abuse against those who are helpless to defend themselves. As we have shown (*see* pp. 9-13 *supra*), there can also be no doubt about the state's power to protect children from such abuse by directly prohibiting it. Surely, the undisputed governmental power to prevent the abuse by directly prohibiting it implies the power to prevent the abuse indirectly by "destroy[ing] the primary economic incentive for [its] commission." Tribe, *supra*, at 666 n.62. Prohibiting distribution of the product discourages distributors from selling it and thereby decreases the profits of the producers. A decrease in profits leads to less production, hence, less sexual abuse of children. The distributor serves as the

> vital link in the industry between the market and the production process. The economic incentives to produce are provided by the distributor's activities. Without these economic incentives, production of child pornography and the connected child abuse would be severely curtailed. . . . Note, *Protection of Children From Use in Pornography: Toward Constitutional and Enforceable Legislation*. 12 Mich. J.L. Reform 295, 313 (1979).

Prohibiting the distribution of child pornography as a means to prevent the sexual abuse of children in its production is no different in principle from prohibiting distribution of products manufactured by exploiting child labor. This Court has recognized the power of the state to prevent exploitation of child labor by prohibiting commerce in goods produced by that labor. *See United States* v. *Darby*, 312 U.S. 100, 116, 119, 125 (1941). Today's more pernicious form of exploitation of children calls for a similar approach. Indeed, if New York had merely enacted general

legislation prohibiting the sale of any item produced by sexually exploiting children, the *Darby* case would be persuasive authority for upholding that prohibition. *Cf. Oklahoma Press Publishing Co.* v. *Walling*, 327 U.S. 186, 193 (1946). Instead, New York and nineteen sister states,[8] faced with a problem involving only sexual performances, enacted narrower legislation addressed exclusively to the context in which the problem manifested itself. Given the compelling state interest in protecting children from sexual abuse, there is no reason to treat the specific statute differently from a more general one.

Of course, the most significant harm to be prevented by a ban on the distribution of materials depicting sexual conduct by children is the child abuse attendant to the production of these materials. Notably, however, prohibiting the distribution of these materials serves important interests even beyond eliminating the child abuse that occurs during production itself. For example, the materials showing children engaged in sexual conduct are sold to adults who use the materials to convince other children to engage in similar conduct. *See* Appendix II at 13a-14a *infra*. In addition, there is evidence suggesting a link between the sale of these materials and the commission of sex crimes against children. *See* Appendix II at 14a *infra*.

In sum, by prohibiting the dissemination of materials produced by sexually abusing children, the state furthers its compelling interest in protecting children. It remains only to consider whether there is a less restrictive effective alternative to achieve this important interest. There is none.

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8. *See* statutes collected in note 4, *supra*.

Only two alternatives have been suggested. The first is a prohibition only of the actual sexual abuse and the second is a prohibition on the dissemination of obscene materials only. Both of these alternatives rely on one of the other two New York provisions enacted with Section 263.15. Neither is an effective alternative to the ban on dissemination of non-obscene as well as obscene materials.

The prosecution only of those who directly abuse children is not an effective alternative because those who produce the material, abusing the children in the process, generally do their work in secret. True, there has been limited success in ferreting out and prosecuting a few producers. *See* C. Linedecker, Children in Chains (1981). Nonetheless, as emphasized in the congressional hearings, virtually all of this material is produced in a way that defies detection, so that the only effective way to curtail production is to exclude the material from the market entirely.[9] As recognized by Professor Tribe:

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9. In the words of Charles Rembar, commenting on proposed federal legislation which would bar the dissemination of non-obscene child pornography, "It hits expression only as a corollary, in my judgment a very necessary corollary. It is necessary because . . . the kind of action the bill aims at is not done in public places. It is an impossible prosecutorial job to try to get at the acts themselves." Sexual Exploitation of Children, Hearings Before the Subcomm. on Crime of the House Comm. on the Judiciary, 95th Cong., 1st Sess. (1977) (hereinafter cited as Sexual Exploitation of Children I), p. 34. *See also id.* at 11 (statement of Frank Osanka, Professor of Social Justice and Sociology and specialist in child abuse and neglect), 69 (statement of Investigator Lloyd Martin, Sexually Exploited Child Unit, Los Angeles Police Department), 142 (statement of Assistant Attorney General John C. Keeney); Sexual Exploitation of Children, Hearings Before the Subcomm. on Select Education of the House Comm. on Education and Labor, 95th Cong., 1st Sess. (1977) (hereinafter cited as Sexual Exploitation of Children II), pp. 118-19 (statement of Robin Lloyd), 254 (statement of Father Bruce Ritter,

(footnote continued on next page)

> Given the great difficulty of directly enforcing laws against the crimes being filmed (especially if faces are concealed), and given the lack of any economic incentive to commit such crimes apart from the market for films of their commission (contrast films of bank robberies, say), it seems insufficient to reply that government must pursue the less restrictive alternative of prosecuting the underlying crimes rather than prosecuting the filmmaker or indeed confiscating the film. Tribe, *supra*, p. 666 n.62.

In search of a less restrictive alternative, respondent argued, and the court below agreed (App. A, at 6a), that since all that was objectionable in materials showing children engaged in sex would fit within the definition of obscenity, the state's interest in protecting children could be fully protected by Penal Law Section 263.10, which bans the dissemination of obscene materials. To the contrary, it is simply unrealistic to believe that an obscenity requirement would discourage distributors from dealing in child pornography. This belief ignores the reality that the obscenity laws have failed to discourage the distribution of obscenity. *See* Project, *An Empirical Inquiry into the Effects of Miller* v. *California on the Control of Obscenity,*

Director, Covenant House, New York City), 272-73 (statement of Charles Rembar).

Even a senior editor for Playboy, who opposes a ban on dissemination, has seen the logic of this approach.

> Everyone agrees that the sexual abuse of minors can and should be prosecuted. The problem is that the traffic in the resulting pornography encourages such child abuse by making it profitable. And police claim they find it difficult to identify the actual producers or to trace down the abused children—let alone to get them to testify and have that testimony accepted in court. The obvious course is to shut down the market. Shea, *Kids in Pornography,* Playboy, vol. 24, no.8, p. 54 (1977).

52 N.Y.U.L. Rev. 810, 886-90 (1977) (hereinafter cited as *Project on Obscenity*). The deterrent value of the statutory ban on obscenity is effectively undercut by the difficulties in prosecuting obscenity cases successfully. The same difficulties in the prosecution of obscenity would be presented if a prosecution for disseminating materials depicting sexual conduct of children turned on proof of the obscenity of those materials.

To begin with, the concept of obscenity is complex, and its application to particular cases is a "matter of considerable delicacy," *United States* v. *Various Articles of Obscene Merchandise*, 600 F.2d 394, 402 (2d Cir. 1979), resting on often highly elusive criteria. For example, defense counsel have argued successfully that even though the materials at issue in a particular case are disgusting, they simply do not appeal to the prurient interest in sex of either heterosexuals or any sexually deviant group, or are not patently offensive by community standards. Indeed, in this very case, respondent was acquitted of selling obscene films in violation of Section 263.10. Defense counsel agreed that these films were disgusting and offensive and told the jurors that they could well find the films repulsive, but still he called for an acquittal on the ground that the prosecution failed to prove the films appealed to the prurient interest of the particular group identified by the prosecutor. Regardless of the reason for acquittal, this very case shows that the obscenity standard is easily manipulable, and that its deterrent effect is thus at best questionable.[10] *Project*

10. To demonstrate the point further, one need only cite the various photographs or films which explicitly show adults in various sexual acts and poses, but are nonetheless held to be not obscene. *See, e.g., People* v. *Stabile*, 58 Misc.2d 905, 296 N.Y.S.2d 815 (N.Y.C. Crim. Ct. 1969). Substituting children for adults in these photographs or films is hardly likely to lead to a finding of obscenity.

on Obscenity, supra, 52 N.Y.U.L. Rev. at 923. As seen from respondent's conviction on the dissemination count, Section 263.15 is not so easily avoided.

The deterrent effect of the ban on obscenity is also undermined by the requirement that the work in question must be examined as a whole. *See Miller* v. *California,* 413 U.S. at 24; N.Y. Penal Law §235.00(1)(c). Defense counsel may succeed in persuading a court or a jury that despite one or two or even a substantial number of scenes of a child engaged in sexual conduct, a work has serious value when considered as a whole. *See, e.g., People* v. *New Horizons, Inc.,* —— Colo. ——, 616 P.2d 106 (Colo. Sup. Ct. 1980); *Project on Obscenity, supra,* 52 N.Y.U.L. Rev. at 923. The requirement of examining the work as a whole could permit publications which have been found not obscene to present a "child of the month" in various sexual poses or acts. In addition, the "entire work" requirement would permit filmmakers to exploit children sexually and avoid prosecution by clothing that exploitation with the thinnest of story lines or other non-sexual material.

Moreover, even with so-called serious materials, the obscenity requirement of taking the work as a whole does not protect the child who is abused sexually in the production of that work. This is the reason why the Legislature chose to prohibit the dissemination of both non-obscene and obscene materials depicting children engaged in sexual conduct. As pointed out by a sponsor of New York's statute, "It is irrelevant to the child whether or not the material is obscene or has a literary, artistic, political or social value." Assemblyman Howard L. Lasher, Memorandum in Support of Assembly Bill A. 3587-B, p. 2 (*see* App. C, at 27a).

Given the statutory purpose of protecting children from exploitation in the production of materials which can only be produced by making the children engage in sexual conduct, it would have been incongruous for the Legislature to prohibit the dissemination of obscene materials alone. The elements of obscenity—prurient appeal, patent offensiveness and lack of serious value—all pertain to the content of the material and not to the circumstances of its production. *See* Pope, *Child Pornography: A New Role for the Obscenity Doctrine,* 1978 Ill. L. F. 711, 745. It would be equally inconsistent with that statutory purpose to permit knowing purveyors of child pornography to defend against a charge of distributing a child's sexual performance, *e.g.*, a film or photograph, by showing that the performance at issue is not obscene, however sexually exploitative it might be. Thus, the obscenity statute does not present a less restrictive alternative to the prohibition of dissemination of both obscene and non-obscene materials. Indeed, it presents no alternative at all.

In a further attempt to find a less restrictive alternative, it might be argued that, given that most child pornography is devoted entirely or substantially to depicting children engaged in sexual conduct, the state may ban the distribution only of those materials which are substantially devoted to showing the sexual conduct of children. This kind of prohibition would not turn on elusive community standards, prurient interest, the nature of the work as a whole or the value of the material. A fact finder would merely have to look at the material itself, not its theme, and decide whether depictions of sexual conduct are a substantial part of the whole.

The difficulty with such a standard is that it would exempt works which were produced by sexually abusing children, if they are not substantially devoted to showing that sexual abuse. Children would still be abused in production of such material. Further, such a standard would encourage pornographers to clothe their sexual use of children with other materials, so that the sex was not substantial but nonetheless gave the buyer what he really wanted.

The only reason to prefer a "substantially devoted" standard to a simple ban on the dissemination of all materials depicting sexual conduct of children is the concern that a simple ban would include a few worthwhile works, and thus deprive society of works of artistic, literary or philosophical value. This concern is unrealistic. It is unrealistic because it is unlikely that producers of worthwhile works would find it necessary to require a child to engage in sexual conduct in the production of those works. If it is necessary to express an idea by portraying the sexual conduct of children, there are lawful techniques for doing so, short of having a child perform or simulate sexual acts. A brief examination shows the effectiveness of those techniques.

Notably, the statute, in defining sexual conduct, does not include simple nudity, although it does prohibit lewd exhibition of the genitals. Nudity is prohibited only when it is accompanied by simulated sexual conduct, that is, the explicit depiction of the prohibited acts. N.Y. Penal Law §263.00 (3) & (6). In not prohibiting simple nudity, the statute allows producers ample room to express an idea, convey a message or tell a story about the sexual conduct of children.

Moreover, the statute has no application when actors or actresses or models over sixteen years of age are used to portray children of lesser years, and persons over sixteen are generally available. Thus, although the producers of the recent Broadway production of *Lolita* auditioned seventy-five girls under fourteen for the title role, they finally chose a twenty-four-year-old actress to play the part. Goldstein, *Kids Do the Darndest Things, The Village Voice,* September 24-30, 1980, p. 36 col. 1; *The New York Daily News,* December 12, 1980, p. 9 col. 2. In the production of motion pictures as well, the availability of doubles, the absence of a prohibition on mere nudity and the use of sophisticated cutting techniques leave ample effective means of portraying sexual conduct without having a child under sixteen engage in a sexual act. For example, a double was used to film Brooke Shields' nude scenes in *The Blue Lagoon* and *Endless Love. The New York Times,* June 15, 1980, Section 2, p. 25 col. 2; *Brooke and Teri,* Us, January 19, 1982, p. 69. In short, the producer has sufficient lawful means to tell his audience about the sexual conduct of a child without subjecting a child to sexual abuse, and it is unlikely that the public will be deprived of anything of value because the State of New York has prohibited the dissemination of material produced by sexually abusing children. The desire of those who insist that they want the "real thing" must be subordinated to the state's compelling interest in protecting children.

The court below concluded that it could not give Section 263.15 a limiting construction because that section clearly and unequivocally prohibited the dissemination of non-obscene materials, and in doing so, was inconsistent

with the First Amendment. As demonstrated above, the court was wrong in holding that New York could not prohibit dissemination of non-obscene materials produced by making children engage in sexual conduct. The New York ban on dissemination of such materials has a wide, but nonetheless legitimate, sweep. Of course, it is possible to imagine situations in which protected conduct will fall within the scope of the statute. To take an instance cited by the court below (App. A, at 5a) in the unlikely event that a person would ever be prosecuted for showing "a filmed report of New Guinea fertility rites," that person could interpose a defense based on the unconstitutionality of the statute as applied. Given the legitimate breadth of the statute, these limited situations can be dealt with on a case by case basis, without resort to the drastic remedy of declaring the statute unconstitutional on its face. *See Broadrick* v. *Oklahoma*, 413 U.S. 601, 614-17 (1973).

Despite the statute's broad legitimate sweep, it is possible that in certain defined circumstances the dissemination of non-obscene materials showing children engaged in sexual conduct is protected. In that event, the case should be remanded to the New York Court of Appeals to determine whether Section 263.15 can be construed so as not to encompass dissemination in those circumstances. *See Time* v *Hill*, 385 U.S. 374, 377 (1967). To afford the Court of Appeals an opportunity to construe the statute is particularly judicious here, because that court, having concluded that the state could not regulate non-obscene materials, did not even attempt to render a limiting construction.

(C) Section 263.15 is not underinclusive because there was good reason to prohibit the dissemination of materials depicting the sexual abuse of children without also prohibiting dissemination of materials depicting other conduct harmful to children.

The New York Court of Appeals held that even if the Legislature were empowered to prohibit the dissemination of materials whose production is harmful to children, Section 263.15 is nevertheless unconstitutionally "underinclusive" because it prohibits dissemination only of materials which show children engaged in sexual conduct, and not of those which depict children engaged in dangerous stunts or other activities which the Legislature has found dangerous to their health. The court found this discrimination unjustified by anything more than "special legislative distaste" for portrayals of children engaged in sexual conduct (App. A, at 5a- 6a).

In reaching this conclusion, the court below relied solely on *Erznoznik* v. *City of Jacksonville*, 422 U.S. 205 (1975), but that case is inapposite. In *Erznoznik*, a Jacksonville city ordinance made it unlawful for a drive-in theater to exhibit movies containing nude scenes if such movies could be seen from a public place. During oral argument, counsel for the city argued that the purpose of the ordinance was to permit the smooth flow of traffic. In finding the ordinance underinclusive, this Court pointed out that it singled out one form of protected speech (movies with nudity) but failed to regulate other protected speech (other movies, *e.g.*, those containing violence) which created the same danger to traffic. *Id.* at 214-15. Thus, it appeared that the ordinance was designed to censor content rather than facilitate the flow of traffic.

In this case, there has been no attempt to censor expression because of its message, idea, subject matter or point of view. Rather, prohibiting the dissemination of materials depicting sexual abuse but not the dissemination of materials showing children engaged in other types of harmful conduct is justified by special concerns about the sexual exploitation of children. As pointed out by Judge Jasen, dissenting below, the real danger of psychological and emotional injury resulting from the production of materials which exploit children sexually constitutes good reason for a prohibition aimed specifically at those materials (App. A, at 15a). Certainly, the New York Legislature could reasonably conclude that other types of harm to children which might result from their participation in illegal performances, *e.g.*, injury from dangerous stunts, are not threats of the same type or magnitude as those involved in sexual abuse.

Moreover, there is no evidence to suggest that dangerous stunts or other kinds of dangerous employment are not effectively dealt with by existing direct prohibitions on the use of children in such circumstances. *See, e.g.*, New York Education Law §3231-a (child under sixteen may not be employed as, *inter alia*, a rope or wire walker, gymnast, rider upon a horse or other animal, acrobat or "in any practice or exhibition or place dangerous or injurious to the life, limb, health or morals of such child"); New York Labor Law §133 (child under sixteen may not be employed in house painting, manufacturing, operation of grinding, cutting or slicing machines or elevators, logging, mining, *etc.*). By contrast, there are ample reasons supporting the conclusion that the sexual abuse of children in the production of materials showing them engaged in sexual conduct

cannot be stopped without prohibiting dissemination of those materials. *See* pp. 17-18, *supra*.

Neither *Erznoznik* nor any other decision of this Court stands for the proposition that the Legislature cannot take action against a particular danger which is a greater threat than other arguably similar dangers which the Legislature has decided not to address. Accordingly, the Legislature was justified in prohibiting the traffic in child pornography, without at the same time banning the dissemination of other materials whose production may be harmful to children.

(D) Prohibiting the dissemination of materials depicting sexual conduct by children regardless of where that conduct occurs is well within the state's police power.

Section 263.15 prohibits dissemination of materials in New York regardless of whether the sexual abuse depicted in the film occurred in the state. The court below, in a single sentence and without any citation whatever, questioned whether New York State had the power to prohibit the dissemination of material depicting a sexual performance by a child if that performance did not take place in New York. Unfortunately, after asking the question, the court did not answer it.[11]

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11. Even though respondent did not raise the question and the court below did not decide it, an argument based upon the absence of police power could be made as an alternative ground for affirmance. *See United States* v. *New York Telephone Co.*, 434 U.S. 159, 166 n.8 (1977). Given the possibility that time will not permit a reply brief, we have chosen to answer that argument now. Moreover, many of the reasons why this legislation is a proper exercise of the police power likewise demonstrate why a ban on the dissemination only of material which depicts the sexual conduct of New York children would not be an effective alternative to a ban on the dissemination of materials which depict such conduct regardless of where it occurs.

Above, we have shown that a state can, consistently with the First Amendment, prohibit the dissemination of both non-obscene and obscene materials depicting sexual conduct of children. New York can enact such a prohibition pursuant to its police powers, provided that the prohibited conduct has a nexus to the state and that the Legislature could rationally conclude that such a prohibition would further the welfare of the citizens of New York. *See Day-Brite Lighting, Inc.* v. *Missouri*, 342 U.S. 421, 423-424 (1951); *Nebbia* v. *New York*, 291 U.S. 502, 537-538 (1934). There is no doubt that the prohibition on the dissemination of child pornography in New York, regardless of the place of origin of the pornography, satisfies this standard.

The forbidden conduct, *i.e.*, dissemination, of course has a direct relationship with New York: it occurs in that state. Equally manifest is that the prohibition on dissemination of materials depicting sexual conduct by children, regardless of the materials' place of origin, protects New York children. It is often impossible to determine where pornographic material is produced. The products in the market generally do not identify the producer, and the chain of distribution is impossible to trace. In this regard, it is well known that domestic producers ship material produced in the United States to associates in foreign countries, who then process the material and return it to the United States.[12] In other instances, order forms sent to foreign outlets have been transferred thereafter to do-

12. King, *Chicago Jury to Probe Pornography and Prostitution Involving Boys, New York Times*, May 23, 1977, p. 19 col. 2; Sneed, Bliss, Moseley, *et al., Child Pornography: Sickness for Sale*, series of articles in *Chicago Tribune*, reprinted in Sexual Exploitation of Children I, *supra* note 9 at 430.

mestic producers or distributors, who fill the orders.[13] In either case, the purpose is to make it impossible to determine where the material was produced. Thus, the Legislature decided that prohibiting only the dissemination of materials produced in New York would be ineffective, and would not adequately protect New York children.

Moreover, if the ban extended only to materials produced in New York, the sale in New York of materials produced elsewhere could still flourish. The substantial market for child pornography in New York would encourage adults desiring to "get in on the action" to produce photographs or films here or to take New York children elsewhere for such production. If that market is reduced and the profits decreased through a complete ban on dissemination, then the threat to New York children is reduced.

Significantly, the prohibition against dissemination in New York of child pornography produced elsewhere, and the similar prohibitions of nineteen sister states, interlock to reinforce each state's ban on the sexual abuse of its own children by reducing the available market for the product of the abuse. State child labor laws are based on a similar idea. *See, e.g.,* N. Y. General Business Law §69-a. If this Court holds that a state constitutionally may prohibit dissemination, then it is possible that most, if not all, states as well as the Congress would enact such prohibitions. Then the bans on dissemination will even more effectively

13. Sexual Exploitation of Children: A Report to the Illinois General Assembly, p. 176 (1977); Sexual Exploitation of Children II, *supra* note 9 at 112-13 (statement of Robin Lloyd); Report to the Attorney General on Child Pornography in California, p. 6 (1977); Linedecker, Children in Chains, p. 224 (1977).

reinforce each state's prohibition on the sexual abuse of its children in the production of these materials.

Finally, even assuming that the Legislature sought to protect the welfare of children outside New York, that the question of the Legislature's power to do so was ever raised is somewhat surprising in light of the decision of the court below in *Nettleton Co.* v. *Diamond*, 27 N.Y. 2d 182, 264 N.E. 2d 118, 315 N.Y.S. 2d 625 (1970), *app. dism'd for want of a substantial federal question, sub nom. Reptile Products Assn., Inc.* v. *Diamond*, 401 U.S. 969 (1971). In that case, the court upheld a statute prohibiting the sale of products made from the skins of certain endangered species, including many species not indigenous to New York. According to the court, "the wildlife of the world is a vital asset to the people of this state," and it was not for the judiciary to substitute its judgment for that of the Legislature, which had concluded that by "eliminating the market for their species in New York State, the potential for their continued existence will be strengthened." 27 N.Y. 2d at 193, 264 N.E. 2d at 124, 315 N.Y.S. 2d at 633. Surely, the New York Legislature was entitled to find that children, regardless of where they live, deserve similar protection.

Conclusion

The judgment appealed from should be reversed.

Respectfully submitted,

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January 15, 1982

APPENDICES

The following appendices contain the constitutional and statutory provisions involved in this case (App. I) and a discussion of child pornography (App. II). References in the brief to lettered appendices A, B and C are to the appendices to the petition for a writ of certiorari.

APPENDIX I

Constitutional and Statutory Provisions Involved

The First Amendment of the United States Constitution provides, in pertinent part:

> Congress shall make no law . . . abridging the freedom of speech, or of the press. . . .

The Fourteenth Amendment of the United States Constitution provides, in pertinent part:

> [N]or shall any State deprive any person of life, liberty or property, without due process of law . . . .

The relevant sections of Article 263 of the New York Penal Law provide:

> §263.00 *Definitions*
>
> As used in this article the following definitions shall apply:
>
> 1. "Sexual performance" means any performance or part thereof which includes sexual conduct by a child less than sixteen years of age.
>
> 2. "Obscene sexual performance" means any performance which includes sexual conduct by a child less than sixteen years of age in any material which is obscene, as such term is defined in section 235.00 of this chapter.
>
> 3. "Sexual conduct" means actual or simulated sexual intercourse, deviate sexual intercourse, sexual bestiality, masturbation, sado-masochistic abuse, or lewd exhibition of the genitals.
>
> 4. "Performance" means any play, motion picture, photograph or dance. Performance also means any

other visual representation exhibited before an audience.

5. "Promote" means to procure, manufacture, issue, sell, give, provide, lend, mail, deliver, transfer, transmute, publish, distribute, circulate, disseminate, present, exhibit or advertise, or to offer or agree to do the same.

6. "Simulated" means the explicit depiction of any of the conduct set forth in subdivision three of this section which creates the appearance of such conduct and which exhibits any uncovered portion of the breasts, genitals or buttocks.

7. "Deviate sexual intercourse" means the conduct defined by subdivision two of section 130.00 of this chapter.

8. "Sado-masochistic abuse" means the conduct defined in subdivision five of section 235.20 of this chapter.

§263.05 *Use of a child in a sexual performance*

A person is guilty of the use of a child in a sexual performance if knowing the character and content thereof he employs, authorizes or induces a child less than sixteen years of age to engage in a sexual performance or being a parent, legal guardian or custodian of such child, he consents to the participation by such child in a sexual performance.

Use of a child in a sexual performance is a class C felony.

§263.10 *Promoting an obscene sexual performance by a child*

A person is guilty of promoting an obscene sexual performance by a child when, knowing the character

and content thereof, he produces, directs or promotes any obscene performance which includes sexual conduct by a child less than sixteen years of age.

Promoting an obscene sexual performance by a child is a class D felony.

§263.15 *Promoting a sexual performance by a child*

A person is guilty of promoting a sexual performance by a child when, knowing the character and content thereof, he produces, directs or promotes any performance which includes sexual conduct by a child less than sixteen years of age.

Promoting a sexual performance by a child is a class D felony.

APPENDIX II

The sexual abuse of children in the production of films, photographs and live performances is a major problem of national significance. The nature and extent of such abuse was delineated in the congressional hearings held from May to September 1977, before enactment of the federal child pornography statute, 18 U.S.C. §§2251 *et seq.*[1] The subject was considered in other legislative forums and investigative reports dating from the same period,[2] and was extensively illuminated in the news media also beginning in 1977.[3] The problem has been treated in several

1. *See* Sexual Exploitation of Children, Hearings Before the Subcomm. on Crime of the House Comm. on the Judiciary, 95th Cong., 1st Sess. (1977) (hereinafter cited as Sexual Exploitation of Children I); Protection of Children Against Sexual Exploitation, Hearings Before the Subcomm. to Investigate Juvenile Delinquency of the Senate Comm. on the Judiciary, 95th Cong., 1st Sess. (1977) (hereinafter cited as Protection of Children Against Sexual Exploitation); Sexual Exploitation of Children, Hearings Before the Subcomm. on Select Education of the House Comm. on Education and Labor, 95th Cong., 1st Sess. (1977) (hereinafter cited as Sexual Exploitation of Children II).

2. *See* Obscenity and the Use of Minors in Pornographic Material, Hearings Before the California Assembly Committee on Criminal Justice (1977); Attorney General's Advisory Committee on Obscenity and Pornography, Report to the Attorney General on Child Pornography in California (1977); Sexual Exploitation of Children, A Report to the Illinois General Assembly by the Illinois Legislative Investigating Commission (1977) (hereinafter cited as Sexual Exploitation of Children [Illinois]); Interim Report of Texas House Select Committee on Child Pornography: Its Related Causes and Control (1978).

3. *See, e.g.*, Sneed, Bliss, Moseley, *et al., Child Pornography: Sickness for Sale*, series of articles in *Chicago Tribune*, May 15-17, 1977, *reprinted in* Sexual Exploitation of Children I, *supra* note 1 at 428-42 *and in* Protection of Children Against Sexual Exploitation, *supra* note 1 at 130-50; Clifford, series of articles on child prostitu-

(footnote continued on next page)

books written for a general audience,[4] and it has begun to receive scientific attention as well.[5]

The evidence reported in these sources establishes two propositions convincingly. First, by the middle seventies, the use of children engaged in sexual conduct in the production of films, photographs and live performances had become a major reality, in New York and elsewhere in the United States. Second, this use of children is a form of sexual abuse and is seriously harmful to the children involved.

A

In 1977 it was estimated that commercial child pornography accounted for five to ten percent of sales in the por-

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tion and pornography, *The Jackson (Mississippi) Daily News*, August 24-28, 1980; *Kiddie Porn*, 60 Minutes, vol. IX, No. 33, May 15, 1977, *reprinted in* Protection of Children Against Sexual Exploitation, *supra* note 1 at 123-30; *Child Pornography: Outrage Starts to Stir Some Action*, U.S. News and World Report, June 13, 1977, p. 66; *Child's Garden of Perversity*, Time, April 4, 1977, p. 55, *reprinted in* Sexual Exploitation of Children I, *supra* note 1 at 423; Ditkoff, *Child Pornography*, American Humane, April 1978, pp. 29-32; Anson, *The Last Porno Show*, 8 New Times 46 (1977), *reprinted in* Protection of Children Against Sexual Exploitation, *supra* note 1 at 150-58; Dudar, *America Discovers Child Pornography*, Ms., August 1977, p. 45. *See also* Baker, *Preying on Playgrounds: The Sexploitation of Children in Pornography and Prostitution*, 5 Pepperdine L. Rev. 809 (1978).

4. R. Lloyd, For Money or Love: Boy Prostitution in America, pp. 79-101 (1976); R. Geiser, Hidden Victims: The Sexual Abuse of Children, pp. 109-22 (1979); F. Rush, The Best Kept Secret: Sexual Abuse of Children, pp. 158-69 (1980); C. Linedecker, Children in Chains, *passim* (1981).

5. *See* Schoettle, *Child Exploitation: A Study of Child Pornography*, 19 J. Am. Acad. Child Psych. 289 (1980); Guio, Burgess and Kelly, *Child Victimization: Pornography and Prostitution*, 3 J. of Crime and Justice 65 (1980); Burgess, Groth and McCausland, *Child Sex Initiation Rings*, 51 Am. J. Orthopsych. 110 (1981).

nography industry as a whole.[6] It is impossible to estimate with certainty the size of the pornography industry, but according to one estimate prepared by the California Department of Justice, the industry as a whole generates revenues of $4 billion per year.[7] Even assuming that sales of child pornography comprise a modest five per cent of that total, child pornography produces $200,000,000 annually; in financial terms, clearly, it is a sizeable business.

Before the enactment of Article 263 of the New York Penal Law, child pornography was sold openly in New York. For example, in January 1977 magazines entitled "Lollitots," "Nudist Moppets," "Brat," and "Tots," which showed children from three to sixteen in lewd and suggestive poses, were available in bookstores in Times Square. Also sold in Times Square were films showing children involved in sexual acts. For example, in one film, the well-known "First Communion," a gang of bikers invade a church, crucify the priest and then rape five young girls on the morning of their first communion. Another film sold at the same time depicts an eight year old boy and a ten year old girl engaged in sexual conduct.[8] An

6. Sexual Exploitation of Children I, *supra* note 1 at 10 (statement of Frank Osanka, Professor of Social Justice and Sociology and specialist in child abuse and neglect), 61 (statement of Investigator Lloyd H. Martin, Sexually Exploited Child Unit, Los Angeles Police Department); *see* Dudar, *supra* note 3 at 46.

7. Cook, *The X-Rated Economy*, 122 Forbes 81 (1978).

8. Sexual Exploitation of Children I, *supra* note 1 at 40-44; Sexual Exploitation of Children II, *supra* note 1 at 263-65 (statements of Judianne Densen-Gerber, J.D., M.D., President, Odyssey Institute). *See* Campbell, *Help Sought for Children Used in Pornography, New York Times*, Jan. 14, 1977, Pt. II, p.3, col. 1; Anson, *supra* note 3 at 150-51; Linedecker, *supra* note 4 at 31. The contents of "First Communion" are described in testimony

(footnote continued on next page)

undercover police officer who operated an "adult" bookstore in the Times Square area found child pornography more profitable than materials showing adults. According to the officer, "You pay, say, $3 for a film, you sell the same film for $20. Eight millimeter, 10- or 15-minute things. For children, you'd pay more, maybe $7, then you sell for $25.'"[9] There are also accounts of girls and boys as young as thirteen dancing in live strip shows and "peep-shows" in Manhattan.[10]

The extent of the traffic in New York in materials which show children engaged in sex can be judged by the amounts of materials seized in arrests of New York pornographers. In April 1977, two raids in Manhattan produced 4,000 copies of "peep-show" films showing children from eight to twelve years old.[11] In another raid in Nassau County, the police confiscated 4,000 photographs of girls aged eight to fourteen engaged in sexual conduct with adults, sometimes their own fathers, including intercourse and oral sex. The photographer marketed the pictures through adver-

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before the Subcommittee to Investigate Juvenile Delinquency. Protection of Children Against Sexual Exploitation, *supra* note 1 at 67 (statement of Frank Osanka). The contents of seven other films were also described, showing children engaged in acts of rape, intercourse, masturbation, oral copulation, anal-genital contact and urolagnia, with other children and with adults. According to Dr. Osanka, the theme of sado-masochism prevails in many of the films and magazines he described for the Subcommittee. *Id.* The theme of bestiality is also to be found. For example, in New Orleans, police arresting three Boy Scout leaders involved in a boy prostitution and pornography ring discovered boxes of photographs of men and boys engaging in sex with animals. Linedecker, *supra* note 4 at 75-76.

9. Cook, *supra* note 7 at 88.

10. T. Abel-Petersen, Children of the Evening, pp. 97-101 (1981); Sexual Exploitation of Children II, *supra* note 1 at 251 (statement of Bruce Ritter).

11. Ivins, *Eight Held as Principals in Smut Production, New York Times*, April 27, 1977, p.1 col. 6.

tisements in Screw magazine; along with the photographs, the police discovered mailing lists containing thousands of names, primarily from New York, Connecticut, New Jersey, Pennsylvania and Florida. In all, some twenty-five girls were involved in this "cottage industry" mail-order child pornography ring.[12]

Pornographic magazines, photographs and films involving children are not peculiar to New York. In his research on boy prostitution and pornography, Lloyd found no fewer than 264 different magazines showing children involved in sex,[13] and large-scale distributors or would-be distributors of pornographic films and photographs have been identified in such towns and cities as Port Huron, Michigan, Winchester, Tennessee, Santa Clara, California, Houston, Chicago and New Orleans.[14]

In sum, the nationwide child pornography industry produces and disseminates materials devoted to showing children engaged in every kind of sexual act imaginable. As

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12. Linedecker, *supra* note 4 at 13-17; *see People* v. *Byrnes*, 33 N.Y. 2d 343, 352 N.Y.S. 2d 913, 308 N.E. 2d 435 (1974).

13. Sexual Exploitation of Children I, *supra* note 1 at 333; Sexual Exploitation of Children II, *supra* note 1 at 113.

14. Linedecker, *supra* note 4 at 37-60, 74-80; Lloyd, *supra* note 4 at 85-89; Protection of Children against Sexual Exploitation, *supra* note 1 at 35-42 (statement of Gerald A. Richards, pornographer); Sexual Exploitation of Children I, *supra* note 1 at 75-76, 94-95 (statement of Robert F. Leonard, District Attorney, Genesee County, Michigan), 82-88 (articles by Wright, *et al.* in *Traverse City Record-Eagle*), 435-40 (Sneed, Bliss and Moseley, articles in *Chicago Tribune*), 442-43 (Loggins and Branscome, *Boys Farm Scandal: People in Rural Tennessee County 'Just Didn't Know' What Went On, Washington Post*, June 5, 1977); Sexual Exploitation of Children II, *supra* note 1 at 112 (statement of Robin Lloyd); Sexual Exploitation of Children (Illinois), *supra* note 2 at 129, 165-71, 175-77; Interim Report of Texas House Select Committee on Child Pornography: Its Related Causes and Control, *supra* note 2 at 62-63, 69-72, 76-77.

we will now see, the inevitable and tragic byproduct of this production and dissemination is profound physical and, especially, psychological damage to the children victimized by the industry.

B

Adults who make children engage in sex before cameras or audiences commit a form of sexual abuse which is seriously damaging to the child. The most obvious danger, particularly where the child engages in sexual activity with an adult, is the possibility of physical injury or infection resulting from the act itself.[15] But the psychological consequences of such activity may be even more deleterious; although physical injury or disease can heal or be cured medically, the emotional trauma "may and usually does result in prolonged or permanent damage to the individual."[16] The child, merely by reason of immaturity, cannot intelligently consent to sexual activity involving an adult.[17] Beyond mere inability to consent, in many cases the child may actually be coerced into participating by pa-

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15. Blumberg, *Child Sexual Abuse: Ultimate in Maltreatment Syndrome*, 78 New York State Journal of Medicine 612-16 (1978); *see* Sgroi, *Comprehensive Examination for Child Sexual Assault: Diagnostic, Therapeutic and Child Protection Issues, reprinted in* Burgess, Groth, Holmstrom and Sgroi, Sexual Assault of Children and Adolescents, pp. 143-57 (1978).

16. Blumberg, *supra* note 15 at 614.

17. Sexual Exploitation of Children I, *supra* note 1 at 5 (statement of Frank Osanka). *See* Finkelhor, *What's Wrong with Sex Between Adults and Children?* 49 Am. J. Orthopsych. 692, 694-95 (1974); Burgess and Holmstrom, *Sexual Trauma of Children and Adolescents: Pressure, Sex and Secrecy, reprinted in* L. Schultz, The Sexual Victimology of Youth, pp. 67-71 (1980).

rental command, physical abuse or blackmail.[18] Such nonconsensual sexual activity disrupts the child's natural sexual development and can have a devastating effect on the child's personality and relationships with others.[19] The harm is clear from the symptoms observed in children prematurely sexualized by adults. They develop symptoms such as headaches, loss of appetite, enuresis, loss of sleep and nightmares, and social symptoms such as poor performance in school, withdrawal from normal social life and sexual delinquency.[20] Of course, where the sex act is forcible, the trauma is all the more severe.[21]

One abundant source of models for the child pornographer is runaways, who often turn to posing for pornographic photographs and films in order to survive.[22] For the child who sells his or her body out of economic need, the psychological results can be devastating. Sex is removed from the context of affection and transformed into

18. *See* Guio, Burgess and Kelly, *supra* note 5 at 68, and other sources cited in Appendix C (pp. 8a-10a) of the brief *amicus curiae* submitted by Covenant House in support of the petition for certiorari; *see also* Anson, *supra* note 3 at 152; Linedecker, *supra* note 4 at 14-15.

19. Blumberg, *supra* note 15 at 614; Sexual Exploitation of Children I, *supra* note 1 at 9 (statement of Frank Osanka), 41-43 (statement of Dr. Densen-Gerber); Weeks, *The Sexually Exploited Child*, 69 So. Med. J. 848, 850 (1976); *see also* Gaylin, *The Prickly Problems of Pornography*, 77 Yale L. J. 579, 592-93 (1968).

20. Blumberg, *supra* note 15 at 614; Burgess, Groth and McCausland, *supra* note 5 at 115-16; Burgess and Holmstrom, *supra* note 17 at 72-80.

21. Blumberg, *supra* note 15 at 614; Finkelhor, Sexually Victimized Children, pp. 104-07 (1979).

22. Sexual Exploitation of Children I, *supra* note 1 at 57, 59 (statement of Investigator Martin); Sexual Exploitation of Children II, *supra* note 1 at 249-51 (statement of Bruce Ritter); Abel-Peterson, Children of the Evening, *supra* note 10, *passim*; Koestler, Runaway Teenagers, Public Affairs Pamphlet No. 552, p. 8 (1981).

an impersonal act, the subject of a commercial transaction. The child comes to view himself or herself as an object to be sold.[23] According to Father Bruce Ritter of Covenant House,

> The worst part of it is that children have no understanding of consequences. They haven't developed any kind of insight, while attitudes form very quickly. This means that if you put a kid in the sex industry, he's going to split himself in two. For a while he's going to stay inside one half of his head and decide, "What I am over here is good and that's me, and what I do over there is something else." But gradually the two sides begin to merge, and the attitudes almost invariably follow the activity, not vice versa. We used to think that the kid got into the industry because of bad attitudes and then healed when he stopped, but that's not so—it's pretty much always the other way around. A kid gets into prositution because he has to survive, he has no place to go; and then once he's involved, the attitudes that justify it take shape.[24]

There has been little scientific study of these effects due to the recency of child pornography as a focus of concern. However, the single reported psychiatric case history[25] firmly supports the view that involvement in child por-

23. Herbert Freudenberger, quoted in *Child's Garden of Perversity*, Sexual Exploitation of Children I, *supra* note 1 at 424; *see* Stoller, *Centerfold: An Essay on Excitement*, 36 Arch. Gen. Psych. 1019, 1020, 1023-24 (1979); Burgess, Groth and McCausland, *supra* note 5 at 117-18; D. Bracey, "Baby-Pros": Preliminary Profiles of Juvenile Prostitutes, pp. 51-52 (1979).

24. S. Janus, The Death of Innocence, p. 177 (1981). *See also* T. Abel-Peterson, Children of the Evening, *supra* note 10, *passim*; Anson, *supra* note 3 at 154, 156; Protection of Children Against Sexual Exploitation, *supra* note 1 at 18-21 (statement of "Marty," juvenile prostitute in Chicago).

25. Schoettle, *supra* note 5.

nography is seriously harmful. That case involved a twelve-year-old girl involved in a pornography ring for three and one-half years. Her experience brought no pleasure but only fear of recrimination. Projective testing after the ring was exposed depicted her as helpless and depressed, with a denial or pulling away from sexual concerns. "A child whisked into an adult sexual world," she showed confusion of sexual roles, alternately flaunting a pseudomature sexual competence and shrinking from the prospect of maturation. The psychiatrist's observations of the child caused him to conclude that a child's involvement in pornography causes anxiety. If, as in this case, the degree of anxiety aroused is threatening to the immature ego, the experience can be traumatic. Besides these effects resulting from the sexual abuse itself, the child in this case suffered additional guilt, anxiety and loss of self-esteem while recounting her experiences to the police and the courts and in treatment. When neighbors learned of her involvement in the ring, they harassed her to the point where she threatened suicide.[26]

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26. *Id.* at 293-97. Schoettle suggests that the effects of using children to produce pornography resemble those of incest, *id.* at 296-97, and there is wide agreement that incest can bring about substantially harmful effects, such as guilt, depression, feelings of worthlessness and psychologically induced somatic disorders. *See, e.g.*, Summit and Kryso, *Sexual Abuse of Children: A Clinical Spectrum*, 48 Am. J. Orthpsych. 237 (1978); Lewis and Sarrel, *Some Psychological Aspects of Seduction, Incest and Rape in Childhood*, 8 J. Am. Acad. Child Psych. 606 (1969); D. Finkelhor, *supra* note 21 at 31-32, 97-108, 185-214; R. Kempe and C. Kempe, Child Abuse, pp. 54-56 (1978). In addition to these psychological effects, there is evidence linking incest with specific pathological behaviors such as prostitution, James and Meyerding, *Early Sexual Experience As a Factor in Prostitution*, 7 Archives of Sexual Behavior 31 (1978); Sexual Exploitation of Children II, *supra* note 3 at 135 (statement of Henry Giarretto, Director, Santa Clara County Child Sexual Abuse Treat-

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The harms caused to children who are required to engage in sex in the production of films and photographs are not limited to those caused by the production process itself. Once a child's sexual conduct has been recorded, the film or photograph is available to any purchaser or viewer. The dissemination of such materials seriously invades the child's privacy,[27] and it may cause severe embarrassment as well.[28] In some cases, moreover, child molesters have used photographs of their victims to blackmail them into keeping silent.[29]

In addition, such materials may be dangerous to children other than the child depicted. Law enforcement officers observed that child molesters use pornography, includ-

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ment Program), drug abuse, Benward and Densen-Gerber, *Incest As a Causative Factor in Anti-Social Behavior: An Exploratory Study*, 4 Contemp. Drug Prob. 322 (1975), and abuse of the victim's own children. Summit and Kryso, *supra* at 248. *See generally* K. Meiselman, Incest: A Psychological Study of Causes and Effects with Treatment Recommendations, pp. 194-261 (1978). To the extent that the use of a child in the production of pornography resembles incest, it may be expected to have the same pathological results.

27. *See* brief *amicus curiae* submitted by Covenant House in support of the petition for certiorari, pp. 8-14.

28. Consider the reaction of Brooke Shields to a recent proposal to publish photographs of her which were taken in 1975, when she was ten years old: "I'm embarrassed by those photos. I wasn't embarrassed when they were taken, but since then I've become more conscious of boys, of my body and myself. Now I just want to be myself. Those pictures are not me now." The photographs in question depicted mere nudity, not actual or simulated sexual conduct. *Brooke and Teri*, Us, January 19, 1982, p. 65; *see Matter of Shields* v. *Gross*, —— Misc.2d ——, —— N.Y.S.2d ——, N. Y. Law Journal, November 16, 1981, p. 13 col. 1 (Sup. Ct., N.Y. Co., 1981). *See also* L. Lovelace, *Ordeal*, pp. 1, 261 (1980).

29. Sexual Exploitation of Children 1, *supra* note 1 at 58-59 (statement of Investigator Martin); Linedecker, *supra* note 4 at 38.

ing child pornography, to seduce their young victims.[30] And the danger exists that child pornography, like pornography of any kind, will stimulate its adult users to act out in real life the fanstasies it engenders. A direct causal link between child pornography and child molestation has not so far been scientifically established. Nevertheless, child abusers are avid consumers of child pornography,[31] and it is impossible to rule out the danger that pornography is one factor among the complex of causes which precipitate the abuse, particularly where the pornography is of a violent, sadistic nature and the user is sexually disturbed.[32] In 1973 this Court noted that "there is at least an arguable correlation" between obscenity and crime. *Paris Adult Theatre I* v. *Slaton*, 413 U.S. 49, 58 (1973). The case for that proposition is stronger now than it was in 1973,[33] and there is no evidence whatever which suggests that materials which depict children engaged in sexual conduct, whether legally obscene or not, are any less likely to lead to criminal conduct than other pornographic materials.

Ultimately, whether it is possible to show conclusively a correlation between the viewing of child pornography and

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30. Sexual Exploitation of Children I, *supra* note 1 at 58-59 (statement of Investigator Martin); Linedecker, *supra* note 4 at 38.

31. *See, e.g.*, Protection of Children Against Sexual Exploitation, *supra* note 1 at 37-38, 45 (statement of Gerald Richards); Linedecker, *supra* note 4 at 54, 75-76, 214-18.

32. Court, *Pornography and Sex Crimes: A Re-evaluation in Light of Recent Trends Around the World*, 15 International Journal of Criminology and Penology 129, 152-54 (1976); *Sex and Violence: Pornography Hurts*, 118 Science News 166, 172 (1980).

33. *See* Chervenak, *Selected Bibliography on Pornography and Violence*, 40 U. Pitt. L. Rev. 652, 660 (1979) (authorities collected).

the sexual abuse of children is of secondary importance. What is primary and beyond dispute is that the production of child pornography necessarily entails the criminal sexual abuse of the boys and girls who are made to perform. The psychological and physical damage to these children demonstrates conclusively that child pornography is not a victimless crime, but a substantial social evil.

No. 81-55

Office Supreme Court, U.S.
FILED
MAR 4 1982
ALEXANDER L. STEVAS,
CLERK

In The

Supreme Court of the United States

October Term, 1981

THE PEOPLE OF THE STATE OF NEW YORK,
Petitioner,

vs.

PAUL IRA FERBER,
Respondent.

On Writ of Certiorari to the
New York State Court of Appeals

BRIEF FOR RESPONDENT

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Petition for Certiorari filed July 11, 1981
Certiorari Granted November 16, 1981

QUESTION PRESENTED

Whether a state penal statute which abridges the public's right to view non-obscene films, magazines and books which portray adolescent sexual conduct, including scientific and educational works, can be sustained under the First Amendment.

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In The

Supreme Court of the United States

October Term, 1981

No. 81-55

PEOPLE OF THE STATE OF NEW YORK,

Petitioner,

vs.

PAUL IRA FERBER,

Respondent.

On Writ of Certiorari to the
New York State Court of Appeals

BRIEF FOR RESPONDENT

Statement of the Case

On March 2, 1978 an undercover police officer, posing as an out-of-town salesman and a "collector" of "kiddie porn", purchased from respondent Paul Ferber at the Madison Square Book Shop located at 488 Eighth Avenue, in Manhattan two films involving children. One week later respondent was arrested and his store searched. Subsequently, he was indicted and tried for violating New York Penal Law §§ 263.10 (promoting an *obscene* sexual performance by a child) and 263.15 (promoting a sexual performance by a child).

Respondent argued that Penal Law § 263.15 was unconstitutional because it violated the First Amendment

guarantee of free speech. The Honorable Irving Lang ruled on October 24, 1978 that there was "no constitutional impediment to this legislation" (*People v. Ferber*, 96 Misc.2d 669, 409 N.Y.S.2d 632 [S.Ct., N.Y. Co., 1978]).

Upon the denial of the motion to dismiss, respondent proceeded to trial. The jury, after two days of deliberation, found respondent guilty of violating Penal Law § *263.15* but acquitted him on the counts charging violations of § 263.10 (promoting an *obscene* sexual performance by a child).

On January 31, 1979, the trial court sentenced Paul Ferber to 45 days in prison and a conditional discharge on count three, the same sentence to run concurrently on count four.

On February 28, 1980, the Appellate Division, First Judicial Department of the Supreme Court of the State of New York affirmed respondent's conviction without opinion (74 A.D.2d 558, 424 N.Y.S.2d 967 [1st Dept. 1980]).

New York Court of Appeals Decision

The conviction was reversed and the indictment dismissed on May 12, 1981 when the Court of Appeals held that:

> "[T]he statute discriminates against films and other visual portrayals of nonobscene adolescent sex solely on the basis of their content, and since no justification has been shown for the distinction other than special legislative distaste for this type of portrayal, the statute cannot be sustained . . ." (52 N.Y.2d at 681, 439 N.Y.S.2d at 866).

Relying upon the fundamental tenet that, "First Amendment standards remain applicable whenever the effect of a government regulation is to curtail protected modes of expression . . ." (*Id.* at 679, 439 N.Y.S.2d at 865), the Court of Appeals rejected petitioner's argument that § 263.15 did, in fact, advance the state's interests attributed to it.

> "[I]t is important to emphasize that the statute considered in this case (Penal Law § 263.15) does *not* deal with child pornography. Those who employ children in obscene plays, films and books, are still subject to prosecution as are those who sell or promote such materials (see Penal Law §§ 263.15; 263.10). We merely hold that those who present plays, films, and books portraying adolescents cannot be singled out for punishment, simply because they deal with adolescent sex in a realistic but nonobscene manner" (*Id.* at 681, 439 N.Y.S.2d at 866; emphasis added).

Compounding its unconstitutionality, the Court found that the statute was "strikingly underinclusive":

> "Section 263.15 does not prohibit the knowing sale or promotion of any film, or other item, in which a child has performed a dangerous stunt or where production required a child to engage in any of the numerous activities in which the Legislature in the exercise of its police power has determined is dangerous to the health or well-being of child employees . . ." (*Id.* at 680, 439 N.Y.S.2d at 866).

Summary of Argument

The statute before this Court proscribes nonobscene, clearly protected speech without regard to the context and, indeed, even where it contains scientific, educational or other societal value.

This overbroad enactment outlaws any form of exhibition or distribution of publications containing sexual conduct by a child, whether or not a fee is charged, and is, therefore, at war with this Court's longstanding pronouncements holding that only the sexually obscene fall outside the protections of the First Amendment. *Miller v. California*, 413 U.S. 15 (1973). None of the decisions of this Court justify this abrupt rending of a constitutional weft so deeply woven into the fabric of the First Amendment. This is true especially in view of Penal Law

§§ 263.05 and 263.10 which are clearly adequate to achieve the legislature's goal in stemming actual conduct by young people which may be detrimental to their well-being. (Section 263.05 directly prohibits such conduct, whether obscene or not, and § 263.10 prohibits trafficking by anyone in materials which are obscene and, thus, not within the protective mantle of the First Amendment.)

In striking down the enormously broad provisions of § 263.15, the Court of Appeals properly and responsibly recognized the substantial body of "legitimate" works which are outlawed thereby, but portray sexual conduct by a child which are of scientific, cultural, and/or aesthetic value. No rule of "good faith prosecution" will abate the justifiable fears of the legitimate publishers, producers and directors of this nation who go about the business of preparing serious medical, scientific or other socially valuable works which of necessity contain photographs of adolescent sexual behavior. These individuals will undoubtedly be dunned by the prospect of long-term imprisonment for distributing such materials.

This Court has never sanctioned a *per se* exclusion from the First Amendment's protective shield, but has required that context and societal value be considered in order that the First Amendment's goal of providing a wide range of diverse and conflicting ideas and information be achieved. We join in the state's concern for our young people; however, it cannot be achieved at the expense of the suppression of clearly legitimate and valuable speech. It is not anomalous to our constitutional fabric that we sanction only those laws which directly prohibit the evils sought to be extinguished, *e.g.*, child labor, sexual abuse, and the like, yet still permit the dissemination of visual portrayals regarding those subjects.

In short, the state cannot demonstrate a "more important interest" (*Roth v. United States*, 354 U.S. 476, 488 [1957]) for its total ban on pure, nonobscene speech based solely upon its

sexual content simply by claiming that such a measure is necessary in order to reach "conduct" which may or may not be unlawful.

The decision below represents sound judicial reasoning tied to indispensable constitutional precedent which requires that only obscene materials be curtailed. Indeed, in some other jurisdictions only production of the sexual performance as opposed to the distribution of such materials is outlawed, and then in some cases only when the performance is itself obscene. Since the New York legislature chose to cut a wider swath into the area of protected communications, the decision below represents a responsible judgment calculated to bring New York's provision in line with those of some 31 other states which ban only obscene materials from the marketplace of ideas.

In view of the existing New York statutory mechanism for directly curbing the sexual exploitation of children *at its source*, the extreme caution which must be exercised when First Amendment rights are encroached upon, and considering the lack of proof that dissemination of nonobscene sexually explicit pictures of youth is harmful to the subject or the viewer, this Court cannot, as a matter of law, hold that any interest advanced by petitioner transcends or subordinates the principles fostered by the First Amendment.

POINT I

NEW YORK PENAL LAW SECTION 263.15 IS UNCONSTITUTIONAL. IT WORKS SERIOUS AND SUBSTANTIAL VIOLATIONS OF THE FIRST AMENDMENT BY MEASURES AND MEANS UNNECESSARY TO ACCOMPLISH ITS LEGISLATIVE OBJECTIVES. BY ALL STANDARDS AND PRECEDENTS ESTABLISHED BY THIS COURT TO ACHIEVE A FAIR BALANCE OF RIGHTS IN THE ARENA OF FREE EXPRESSION, THE STATUTE IS CONSTITUTIONALLY INFIRM.

The constitutional controversy over New York's child pornography statutory scheme is ostensibly complicated by the public's justifiable concern over the potential exploitation of children in sexual performances. Their fears and anxieties are legitimate and shared by all parties to this proceeding. When a legal question becomes hostage to fear, however, the capacity to analyze it may be lost and contention absorbs all our intellectual energy. At such moments there is posed the greatest threat to First Amendment freedoms, and it is the discipline and structure of law established by decades of precedent by this Court which stands as a breakwall against their erosion by waves of anxiety-motivated legislation.

Each legal thrust made by petitioner in support of the statute has been proffered to this Court before, given full review and consideration, and rejected. The social concerns behind these legal arguments are assimilated and given a measure of weight in a balancing of interests with expressional freedoms. That balance assumes the form of structural tests and an analytical framework under a host of precedents. It is a resort to those balanced decisions and not reliance upon an absolutist position which respondent calls upon in resolution of the conflict of concerns prompted by § 263.15.

In making their case for the statute, petitioner and its *amici* rely upon socio-legal "facts" whose truths are subject to

question.[1] They claim that present legal tools are inadequate to vindicate the State interest advanced and that therefore a large body of First Amendment precedent should be swept aside in favor of what amounts to a call for a new and dangerously unprecedented "exception" to First Amendment protections. This new *per se* exclusion for nonobscene depictions of adolescent sexual behavior, unlike the scant few others that have been grudingly permitted over the years, would apply no matter what the context of the expression, nor the amount of scientific, educational or social value it contained or fostered. This would constitute a giant leap, to be sure, away from the principles and precedents to which the other grudgingly permitted exceptions have been moored.

As an analysis of its provisions demonstrates, the statute's reach is not simply into the darker recesses of otherwise protected expression which may be typified by the films that were purchased here, or other such materials as may be found in some brightly-lit outlet on "Times Square." The larger, more fearsome reach of its constitutionally ugly tentacles, the fear comprising the bedrock for the decision below, is the fact that it permits the police to prowl the shelves of legitimate bookstores, libraries and educational establishments and prosecute for disseminating what may be valuable educational, scientific or otherwise socially worthwhile works. It is from this untolerable and undeniable overbreadth that the legal evaluation of this statute must begin.

As this Court stated in *Broadrick v. Oklahoma*, 413 U.S. 601 (1973):

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[1]The petitioner's and *amici's* briefs are laced with allegations of "fact", recitations of alleged truisms and *ipse dixit* conentions which were never before the Court of Appeals, never subjected to the truth searching safeguards of a proper hearing process nor in any other way validated to the degree necessary to justify reliability. Most such statements are obvious (Pet. Brief, pp. 7-8), and others which so warrant are given special attention later in this brief.

"It has long been recognized that the First Amendment needs breathing space and that statutes attempting to restrict or burden the exercise of First Amendment rights must be narrowly drawn and represent a considered legislative judgment that a particular mode of expression has to give way to other compelling needs of society.

* * *

As a corollary, the Court has altered its traditional rules of standing to permit — in the First Amendment area — 'attacks on overbroad statutes with no requirement that the person making the attack demonstrate that his own conduct could not be regulated by a statute drawn with the requisite narrow specificity. . . .' Litigants, therefore, are permitted to challenge a statute not because their own rights of free expression are violated but because of a judicial prediction or assumption that the statute's very existence may cause others not before the Court to refrain from Constitutionally protected speech or expression (413 U.S. at 611, 612).[2]

Legislative History

In November, 1977, the New York Legislature launched a major offensive against the exploitation of young people in sexual films.[3] The attack was spearheaded by three new sections of the Penal Law — §§ 263.05, 263.10 and 263.15. The stated purpose of this legislation was "to protect children from ex-

[2]Contrary to the claims of petitioner and *amici*, § 263.15 involving as it does "speech" as opposed to "conduct" is not a proper subject for a "case-by-case" analysis, but falls squarely within the full parameters of the overbreadth doctrine as set forth in *Broadrick v. Oklahoma*, 413 U.S. at 616.

[3]"The wave of publicity and the public clamor for immediate action undoubtedly prompted the federal and state legislatures into action. As is the case with most hurried actions, however, what becomes law may not always be the best legislation to deal with the problem, or, perhaps worse, the *legislation may be* unworkable or unconstitutional" (emphasis supplied). Illinois, Legislative Investigating Commn. Report to Illinois General Assembly, Sexual Exploitation of Children, at 192 (Aug. 1980).

ploitation in sexual performances." (*People v. Ferber*, 52 N.Y.2d 674, 678 [1981]; [L. 1977 ch. 910 § 1]).[4]

Section 263.05 makes it a felony punishable by up to fifteen years imprisonment for a person to actually *use* a child in a sexual performance. Section 263.10 makes it a felony punishable up to seven years for a person to promote an *obscene* sexual performance by a child. This latter provision is in accordance with a long line of cases decided in this Court interpreting the First Amendment to exclude sexually related expression which is legally obscene (*Miller v. California*, 413 U.S. 15 [1973]; *Roth v. United States*, 354 U.S. 476 [1957]).

The third section, 263.15, under review here, punishes a person by up to seven years imprisonment for in any way "promoting"[5] an admittedly nonobscene publication as long as it contains in any degree and regardless of the context or societal value, broadly defined "sexual conduct" by a person under sixteen years of age.[6] Section 263.15 eliminates entirely the

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[4]A study of the legislative history, including the commentary shows that scholars, journalists and other interested citizens have cited long lists of potential abuses posed by the statute. Arnold D. Hechtman, a leading authority on statutory construction in New York who wrote the Practice Commentary for § 263.15, noted that the constitutional validity of the statute is suspect due to its broad reach. New York Penal Law Vol. 39 at 434-435 (McKinney).

[5]"Promotion" includes any form of exhibition or distribution whether or not for a fee. (See New York Penal Law Vol. 39, § 263.00[5] [McKinney].)

[6]The statute defines "sexual conduct" to include "lewd" exhibition of the genitals (New York Penal Law § 263.00[3]). "Lewd" is not further defined and can be broadly interpreted to cover a large variety of genital exposure which may be subjectively considered as "lewd". To be sure, "lewd" exhibition is something less than obscene exhibition lest § 263.10 be entirely superfluous. This statutory definition also prohibits obtaining and receiving such nonobscene matter as proscribed by § 263.15. *Cf. Stanley v. Georgia*, 394 U.S. 557, 559 (1969) ([M]ere private possession of obscene matter cannot constitutionally be made a crime).

constitutional prerequisite of obscenity to banning expression having a sexual content.

A. *Section 263.15 is a Classic Example of a Fatally Overbroad Statute Which Here Restricts Protected Speech in Hopes of Affecting Conduct Which May or May Not be Unlawful.*

For over twenty-five years this Court has held that materials of sexual content only fall outside the protection of the First Amendment if they are legally obscene. *Miller v. California*, 413 U.S. 15 (1973); *Roth v. United States*, 354 U.S. 476 (1957). Indeed, in *Miller*, this Court took great pains to emphasize the need for carefully drawn legislation whenever a state seeks to restrict any form of expression and engineered the three-part constitutional test which must be fulfilled before any work may be deemed obscene. A legion of statutes, no doubt enacted with the same well-meaning interests as those of the New York Legislature, have nevertheless been invalidated because they have strayed from this strict constitutional requirement and its predecessor in *Roth v. United States, id.*[7]

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[7]*See, e.g., Rabeck v. New York*, 391 U.S. 462 (1968) ("magazines . . . which would appeal to the lust of persons under the age of eighteen years or to their curiosity as to sex or to the anatomical difference between the sexes"); *Winters v. New York*, 333 U.S. 507 (1948) ("which tends to incite minors to violent or depraved or immoral acts"); *Interstate Circuit v. Dallas*, 390 U.S. 676 (1968) ("portrayal of nudity or sexual promiscuity as 'profitable, desirable, acceptable, respectable, praiseworthy or commonly accepted' "); *Kingsley International Pictures Corp. v. Regents*, 360 U.S. 684 (1959) ("sexual immorality as desirable, acceptable or proper"); *Holmby Productions, Inc. v. Vaughn*, 350 U.S. 870 (1955) ("approved . . . moral and proper [publications]"); *Commercial Pictures Corp. v. Regents*, 346 U.S. 587 (1954) ("malicious, scandalous and defamatory"); *Gelling v. Texas*, 343 U.S. 960 (1952) ("prejudicial to the best interests of the people"); *Joseph Burstyn, Inc. v. Wilson*, 343 U.S. 495 (1952) ("sacrilegious"); *Radford v. Webb*, 446 F.Supp. 608 (W.D.N.C. 1978), *aff'd*, 596 F.2d 1205 (4th Cir. 1979) ("any words or language of a profane, vulgar, lewd, lascivious or indecent character, nature or connotation");

Footnote continued on next page—

The *Miller* test has flourished because it strikes a reasonable accommodation between the State's interest in controlling obscene material and the public's right to choose what it will read or see. Therefore, no law dealing with expression on the basis of its sexual content can pass constitutional muster unless it contains this essential element. The presence of this constitutional equation is a matter of necessity in order to preserve the purpose of the First Amendment to permit the free flow of knowledge and information regarding a subject as important as adolescent sex. In the words of this Court in *Roth v. United States*, 354 U.S. 476 (1957):

> "The portrayal of sex, e.g., in art, literature and scientific works, is not itself sufficient reason to deny material the constitutional protection of freedom of speech and press. Sex, a great and mysterious motive force in human life, has indisputably been a subject of absorbing interest to mankind through the ages; it is one of the vital problems of human interest and public concern. As to all such problems, this Court said in *Thornhill v. Alabama*, 310 U.S. 88, 101-102 (1940):
>
> > The freedom of speech and of the press guaranteed by the Constitution embraces at least the liberty to discuss publicly and truthfully *all matters of public concern* without previous restraint or fear of subsequent punishment.
>
> * * *

—Footnote continued from preceding page

Hillsboro News Co. v. Tampa, 451 F.Supp. 952 (M.D. Fla. 1978) ("offensive sexual materials"); *People v. Bookcase, Inc.*, 14 N.Y.2d 409, 252 N.Y.S.2d 433 (1964) ("sale to minor of any book . . . the cover or content of which exploits, is devoted to, or is principally made up of descriptions of illicit sex or sexual immorality"); *Calderon v. Buffalo*, 61 A.D.2d 323, 402 N.Y.S.2d 685 (4th Dept. 1978), *appeal denied*, 44 N.Y.2d 648, 408 N.Y.S.2d 1023 (1978) ("sale to a minor of any book . . . which is obscene, lewd, lascivious, or indecent, or which consists of pictures of nude or partially denuded figures posed or presented in a manner to provoke or arouse lust or passion . . .").

> Freedom of discussion, if it would fulfill its historic function in this nation must embrace *all issues about which information is needed or appropriate to enable the members of society to cope with the exigencies of the period* (emphasis added)" (354 U.S. at 487, 488).

As this Court pointed out so well in *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58, 66 (1963):

> "It is characteristic of the freedoms of expression in general that they are vulnerable to gravely damaging yet barely visible encroachments . . . [T]he freedoms of expression must be ringed about with adequate bulwarks . . . '[T]he line between speech unconditionally guaranteed and speech which may legitimately be regulated * * * is finely drawn.'"

Where expression deals frankly with such sensitive and emotional topics as adult and, to a greater degree, child pornography, these "adequate bulwarks" are of increasing value and utility in the preservation of our First Amendment freedoms.

The Obscenity Control Factor

Without the obscenity control factor, § 263.15 is clearly overbroad. It outlaws any production which addresses adolescent sex in a visual format, whether it be a play, a motion picture or scientific text. Regardless of literary, artistic, political or scientific value, any such endeavor falls prey to its criminal punishments. Thus, the court below insightfully noted:

> ". . . [O]n its face the statute would prohibit the showing of any play or movie in which a child portrays a defined sexual act, real or simulated, in a non-obscene manner. It would also prohibit the sale, showing, or distributing of medical or educational materials containing photographs of such acts. Indeed, by its terms, the statute would prohibit those who oppose such portrayals from providing illustrations of what they oppose. In

> short, the statute would in many, if not all, cases prohibit the promotion of materials which are traditionally entitled to the Constitutional protection from government interference under the First Amendment" (52 N.Y.2d at 678).[8]

Since the statute does not require that the work be "taken as a whole" (*see Erznoznik v. City of Jacksonville*, 422 U.S. 205, n. 7 [1975]), nor that its subject matter be viewed in context, and because it makes no allowance for scientific, educational or other societal value, it fashions a *per se* rule of exclusion. This *per se* approach is unprecedented in First Amendment annals. It permits severe criminal punishment for *bona fide* works of science, medicine or higher learning which portray adolescent sexual conduct which was not unlawful when performed.

Moreover, since the statute punishes with equal force even a fleeting or brief display of the prohibited conduct, such nationally exhibited films as *The Exorcist* (Linda Blair simulating masturbation), *Pretty Baby* (Brooke Shields simulating sexual conduct), and others would be banned in New York, regardless of the fact that the actual underlying activity

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[8]Ironically, many of the studies and reports used by petitioner and *amici* would be non-existent if § 263.15 had already been enacted. The "60 Minutes" broadcast they rely upon is more than likely prohibited. Other materials cited in petitioner's Appendix reflect the author's review of pornographic activity by children. For example, in footnote 3 at p. 5a of petitioner's brief, a reference is made to an article appearing in Ms. Magazine entitled *America Discovers Child Pornography*. Even a casual reading of that article makes it clear that the author viewed visual portrayals of sexual conduct by children. Whomever let the author view those photos, films or live exhibition, whether it be the police, the courts, or social welfare agencies, violated the statute! And indeed, if the definition of "procure" under § 263.00(5) includes mere possession, then the author herself is subject to criminal punishment for her work in preparing that study.

Since petitioner's *amici* often give public presentations in an effort to educate and mobilize the citizenry against the child pornography industry, they would be well advised, in the wake of § 263.15, to limit their efforts by eliminating any visual portrayals which would be in violation of the statute.

portrayed in such works may not have been unlawful in the state where it was produced.[9] A literal application of this untempered legislation would endanger such works as sociological or anthropological documentary films or publications depicting "coming of age" rituals, or a medical text displaying diseased or deformed adolescent genitalia.[10] Also included are illustrated works designed to educate the young regarding adolescent sexuality.[11]

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[9]More than half the states which have enacted so-called child pornography laws, as well as the federal government, only outlaw a portrayal of adolescent sex if it is legally obscene or involves the use of children. These include the so-called enlightened states of California, Connecticut, Illinois, Michigan, Minnesota and Ohio, as well as some of those thought to be conservative, such as Alabama, Florida, Mississippi, North Carolina, South Carolina and Virginia. *See, e.g.*, 18 U.S.C. § 2252; Ala. Code § 13-7-230 *et seq.*; Alaska Stat. § 11.41.455; Ark. Stat. Ann. § 41-4201; Cal. Labor Code § 1309.5; Conn. Gen. Stat. Ann. §§ 53-a-293, 53a-196b (West); Fla. Stat. Ann. § 847.014 (West); Ga. Code Ann. § 54-9903; Idaho Code §§ 18-1517A, 18-4101-03; Ill. Ann. Stat. Ch. 38, § 11-20a (Smith-Hurd); Ind. Code Ann. § 30-11.1; Iowa Code Ann. § 728.12 (West); Kan. Stat. Ann. § 21-3516; Md. Crim. Code Ann. § 419A; Mich. Comp. Laws Ann. § 750.145c; Minn. Stat. Ann. § 716.246; Mo. Ann. Stat. § 568.060; Neb. Rev. Stat. § 28-1463; N.H. Rev. Stat. Ann. § 650:2; Nev. Rev. Stat. § 200.509; N.M. Stat. Ann. § 30-6-1; N.C. Gen. Stat. § 14-190.6; N.D. Cent. Code §§ 12.1-27.1-02, 03; Ohio Rev. Code. Ann. § 2907.321 (Anderson); Ore. Rev. Stat. § 163.477; S.C. Code § 16-15-380; S.D. Codified Laws Ann. 22-22-24, 22-22-25; Tenn. Code Ann. § 39-1019; Tex. Penal Code Ann. Tit. 9, § 43.25 (Vernon); Utah Code Ann. § 76-10-1206.5; Va. Code § 18.2-374.1; Wash. Rev. Code Ann. § 9.68A.030; Wyo. Stat. Ann. § 14-3-102(a)(v)(E). In *State v. Shingaki*, Hawaii Circuit Court, First Circuit Cr. No. 54385, April 27, 1981, held a statute similar to § 263.15 unconstitutional because it too outlawed material that was not obscene.

[10]Since "lewd" exhibition of the genitals is nowhere defined in the New York Penal Law and, in any event, because of its subjective tendencies, escapes precise definition, it thereby further contributes to the breadth of the statute.

[11]In *St. Martin's Press, Inc. v. Carey*, 440 F.Supp. 1196 (S.D.N.Y. 1977), § 263.15 was first declared unconstitutional where the Honorable Robert Ward found it to apply to the critically acclaimed adolescent sex education book, *Show Me*. This decision was later reversed by the Second Circuit on other grounds (605 F.2d 41 [1979]).

Constitutional difficulties arise from § 263.15 because, rather than aim with precision at the heart of the target, the actual conduct, the statute takes aim with shotgun in hand missing some of the serious forms of child abuse that exist (making it underinclusive, see pp. 29-30, *supra*), while at the same time it successfully wounds protected speech with the hope that it will reach the conduct sought to be brought down. While in some areas of legislative concern such imprecision is tolerable, it is in the area of First Amendment freedoms where that toleration ends.[12]

Not only does the statute declare otherwise lawful speech dealing with adolescent sexual conduct, to be *per se* unlawful, it also extends its overbroad reach to conduct which is not considered to be abusive or unlawful in numerous other states from which such materials may emanate (*see* p. 14, n. 9, *infra*).[13]

In the absence of a valid basis, petitioner contends that sexual abuse of a child is suffered and that the same trauma is experienced whether the work which contains the photographs is obscene or not (Pet. Brief, p. 8). Again, this assumes the very point in contention — that the provisions of § 263.15 are, and will be, strictly limited only to instances of child abuse.

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[12]*See, e.g., Doran v. Salem Inn, Inc.*, 422 U.S. 922 (1975); *Erznoznik v. Jacksonville*, 422 U.S. 205 (1975); *Bigelow v. Virginia*, 421 U.S. 809 (1975); *Grayned v. Rockford*, 408 U.S. 104 (1972); *Gooding v. Wilson*, 405 U.S. 518 (1972); *Coates v. Cincinnati*, 402 U.S. 611 (1971); *Dombrowski v. Pfister*, 380 U.S. 479 (1965); *United States v. Raines*, 362 U.S. 17 (1960).

[13]The court below observed:

> "With respect to recorded performances or photographs the statute draws no distinction between those made in this state and those made elsewhere. Anyone who promotes such materials would be subject to prosecution even though the act recorded may have occurred in another state or country where such conduct may not be prohibited. It applies equally to a live performance of a Broadway play and a filmed report of New Guinea fertility rites. Indeed, in this case defendant's conviction did not rest on any contention that the films was made in this state" (52 N.Y.2d at 679-680).

Not every instance of nonobscene but "lewd" exhibition of a child's genitals represents sexual abuse of the child. This is particularly so since "lewd" is not specifically defined and further, its subjective perimeters are not tied to any definite standard, *e.g.*, "Average Adult" (*see Pinkus v. United States*, 436 U.S. 293 [1978]). Thus, a nude photo of a child taken in a neutral, unposed setting or environment for scientific, medical or literary purposes might very well be "lewd" in the eyes of "someone", making the author or producer subject to criminal prosecution. It cannot be said that in those circumstances such children have suffered a psychological trauma and certainly not of the kind or type experienced by those whose interests are the true target of the statute.

Apparently the principal goal of the statute, as borne out by petitioner's brief, is a veiled attack upon this Court's definition of obscenity contained in *Miller*. They argue it is inadequate to suit their needs. The loose provisions of § 263.15, on the other hand, are packed with a greater assurance of prosecutorial success, albeit at the expense of constitutional liberties. In short, the "wide berth" given to First Amendment expression is sacrificed on a statutory altar to the god of expediency.

B. *The* Per Se *Approach of Section 263.15 is Inimical to this Court's Strict Framework for Permitting First Amendment Exceptions.*

This Court has never condoned a wholesale ban on speech because of its content and has always given weight and consideration to the context of the utterance, as well as the responsibility to promote the free exchange of information ranging from the most controversial and distasteful to the most useful and educational (*See, e.g., Cohen v. California*, 403 U.S. 15, 24 [1971]; *Thornhill v. Alabama*, 310 U.S. 88, 95 [1940]).

In the area of obscenity, the now familiar doctrine that ". . . sex and obscenity are not synonymous" (*Roth v. United States*,

354 U.S. at 487) has manifested itself in a number of this Court's decisions, the most recent of which include *Smith v. United States*, 431 U.S. 291 (1977); *Erznoznik v. Jacksonville*, 422 U.S. 205 (1975); *Miller v. California*, 413 U.S. 15 (1973); *Paris Adult Theatre I v. Slaton*, 413 U.S. 49 (1973); and *Kaplan v. California*, 413 U.S. 115 (1973). These holdings fashioned the "obscenity" exception to the First Amendment. That exception does not work a *per se* ban on speech of a sexual content, but only restricts that which is prurient, patently offensive and lacks serious value. Thus, unlike the present ordinance, the obscenity exception permits the free flow of scientific, sociological and educational works dealing with matters of sex.

This *per se* approach is also out of step with this Court's thinking in other cases involving obscenity and young people. In *Ginsberg v. New York*, 390 U.S. 629 (1968), a ban on the actual distribution of sexual materials to minors otherwise protected as to adults, was upheld based upon a compelling interest to protect such individuals. This ban, however, was not of all sexually oriented materials. It applied only to those which lacked some measure of societal value and otherwise fit a "variable" but nonetheless imposed test for obscenity. Thus, it did not create a *per se* exception as does § 263.15.

If petitioner's claims are viewed in the *Ginsberg* context, the creation of all such materials should be outlawed with a wholesale ban on all distribution because their distribution to minors causes harm or abuse. Clearly, petitioner's approach would be unacceptable if made in the *Ginsberg* situation just as it is here. In both cases, a total, inflexible ban would do battle with the flexibility necessary to achieve First Amendment goals.

In other instances where this Court has permitted an exception to free expression, due regard has always been given to the circumstances and societal worth or value of that expression before it has been restricted.

For example, in *Chaplinsky v. New Hampshire*, 315 U.S. 568, 572 (1942), the Court permitted an exception for "fighting words", but only after determining ". . . that such utterances are no essential part of any exposition of ideas, and are of such slight social value as a step to truth . . ."

A common thread running through the holdings of this Court dictates that § 263.15 proscribing the publication, as opposed to creation, of nonobscene depictions of adolescent sexual behavior, ". . . can claim no talismanic immunity from Constitutional limitations" (*New York Times v. Sullivan*, 376 U.S. 254, 269 [1964]). Such laws as those dealing with "libel", "insurrection, contempt, advocacy of unlawful acts, breach of the peace, obscenity, solicitation of legal business, and the various other formulae for the repression of expression that have been challenged in this Court, . . . must be measured by standards that satisfy the First Amendment (*Id.*; footnotes omitted). Petitioners and their *amici* eschew any such standards and instead ask this Court to abandon its past practice of preserving nonobscene speech dealing in matters of sex whether it be adult or adolescent as being "overly simplistic" (Pet. Brief, p. 7).

Petitioner goes on to argue:

> "If the sexual abuse of children in the production of films, photographs and live performances is evil and can be prohibited, it would seem to follow logically that the products of that evil can also be prohibited" (Pet. Brief, p. 15).

If this facile approach were adopted by this Court, how soon would it be before someone with another such simple and "logical" approach will argue for another exception based upon an emotional subject thought to be spawned by an interest just as compelling? For example, if murder, drug abuse, arms building or child labor are evil for young and old alike, it would seem to follow that the products of that evil (books or articles

depicting, describing, portraying or providing instructions) can also be prohibited. It is one thing to directly ban by criminalization the actual "evil" act, but it is quite another to silence all discourse or visual representations of the "evil" itself. The former is clearly conduct, while the latter is clearly speech and protected by the Constitution. The unproven assumption that the elimination of speech outlets will discourage those who create such materials is a dangerous doctrine, especially where, as here, it permits no exceptions.

C. *Section 263.15 Does Not Pass The Conduct Regulation Exception to the Free Expression Protections of the First Amendment.*

Section 263.15 seeks to, and does in fact, curtail speech dealing with the subject of nonobscene adolescent sex. Petitioner's and its *amici's* arguments simply amount to a bold claim that the banning of otherwise legal speech may possibly tend to cause the "conduct", (which may or may not be legal), of actually creating materials or performances containing adolescent sex to subside. Thus, the statute seeks to reach conduct both legal and illegal, by imposing a *per se* ban on otherwise protected speech.

This Court has on several occasions faced attempts to censor lawful speech on the proffered grounds that it may cause unlawful "conduct", and has only permitted such speech to be silenced under the most limited of circumstances. *See, e.g., Hess v. Indiana*, 414 U.S. 105 (1973); *Brandenburg v. Ohio*, 395 U.S. 444 (1969). Here, the petitioner and its *amici* seek to have this Court go beyond those previously drawn boundaries, especially since the present statute is not limited to stemming only unlawful conduct but is intended to ban, through speech curtailment, dissemination of materials lawfully produced under the laws of other sovereignties.

In straining to find support for its position, petitioner tries mightily to stretch and twist this Court's holding in *United States v. O'Brien*, 391 U.S. 367 (1968), to suit its needs.

In *O'Brien*, prosecution was instituted for the conduct of burning a draft card, ostensibly in protest of the Vietnam War. This conduct was proscribed by federal law regardless of the motivation or purpose. That statute, unlike New York Penal Law § 263.15, struck directly at the purported evil conduct and had only tenuous, if any, effect on free expression regarding the Vietnam War. In upholding this purely conduct regulation, this Court employed the following test:

> "[A] governmental regulation is sufficiently justified . . . if it furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest" (*Id.*, 391 U.S. at 377).

When this tripartite test is applied to § 263.15, it clearly fails in all categories. First, whether or not this statute furthers an important or substantial governmental interest is certainly open to question and is not demonstrated on this record.[14] This is especially so when the goal of halting the creation of such materials is sought to be achieved by, at best, the tangential method of banning all distribution of works portraying such conduct.

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[14]This void is not filled by the appendices to Petitioner's and *Amici's* briefs since such materials have never been validated by any hearing process. Indeed, some of these materials post-date the enactment of the statute and present "facts" never put before the Court of Appeals. Moreover, some of these "facts" are rather curious in view of the statement on page 11a of petitioner's brief that "there has been little scientific study" of the alleged "effects" of the actual conduct of producing such material. The petitioner admits the presence of only a "single" case history post-dating the enactment of this statute and, of course, never explored by either side and therefore made a part of the record below (Pet. Brief, p. 11a).

Moreover, under the second prong of the *O'Brien* test, suppression of free expression is directly related to, and is in fact the intended result contemplated by the State in its attempt to achieve its interest.[15] Unlike situations where this Court upheld "conduct" regulation statutes which were "content neutral" and only obliquely touched upon areas of free expression. (*See, e.g., O'Brien, id;* and *Prince v. Massachusetts*, 321 U.S. 158 [1944]), § 263.15 only deals with adolescent sexual activities, and its professed goal is to *curtail* speech on this subject manifested by visual portrayals.

Statutes designed to prevent a particular form or type of communication in order to reach a perceived category of conduct, here child abuse, have only survived constitutional attack where such interest was unrelated to the "suppression of free expression." *See, e.g., Cohen v. California*, 403 U.S. 15 (1971); *Tinker v. Des Moines Independent Community School District*, 393 U.S. 503 (1965). Section 265.15 deals only with speech relating to adolescent sexual behavior. It does not address numerous other areas which have at least the same degree of tenuous connection to child abuse as § 265.15. In noting this failing, the court below observed:

> "Section 263.15 does not prohibit the knowing sale or promotion of any films, or other item, in which a child has performed a dangerous stunt or where production required a child to engage in any of the numerous activities which the Legislature in the exercise of its police power has determined is dangerous to the health or well being of child employees or employees generally (See, e.g., Penal Law § 260.10, subd 1; Labor Law, § 130 *et seq.;* Education Law §3215 *et seq.;* 3228 *et seq.; cf.* Penal Law, § 245.05, subds. 2, 3). The severe penalties imposed by § 263.15 . . . are reserved for those who

[15]The State clearly expressed its "interests" to include a suppression of such expression upon passage of the statute. *Legislative Findings and Declaration*, L. 1977, New York Penal Law [McKinney] Vol. 39, § 263.00.

promote plays, films, books and photographs, dealing with adolescent sex in a nonobscene manner" (52 N.Y.2d at 680).

Thus, to the extent the statute is designed to protect children from acts detrimental to their well being, it is "strikingly underinclusive" (*Id.* at 680-681). *Erznoznik v. City of Jacksonville*, 422 U.S. 205, 214 (1975).

Petitioner argues that "there is no evidence to suggest" that these other sources of potential harm are not already effectively dealt with by existing "direct" prohibitions on the use of children in such circumstances. (Petitioner's Brief, p. 28.) The respondents rejoin by pointing out that this is also true as to the statute under consideration.[16]

Furthermore, there is quite a difference between prohibiting the distribution of a publication of nonobscene adolescent sexual activity and prohibiting a non-expressive product manufactured by a child (Petitioner's Brief, pp. 17-18). The former is clearly speech protected by the First Amendment, whereas the latter is merely a product. The difference ought to be patently obvious since a product does not teach, inform or communicate, nor can it be used to educate or convey ideas.

Finally, the statute fails miserably when compared to the third part of the *O'Brien* test since it does not pose only an "incidental restriction" on the First Amendment freedoms, and it is not the least restrictive means essential to vindicate the purported interest.

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[16]Petitioner claims "ample reasons" in support of a contrary conclusion as to adolescent sexual behavior. However, again, straying from the record, it appears that these "reasons" consist of the untested or unvalidated opinions of others formed apparently after the statute was enacted. These untested "opinions," together with hyperbolic statements, such as, it is "beyond argument . . . [that the] production of materials depicting children engaged in sexual conduct is sexual abuse . . . ," do not carry the day. Would it be sexual abuse to film a coming of age ritual or to photograph under clinical circumstances the fully exposed genitals of an adolescent?

Since § 263.05 directly proscribes the actual making of such materials, and § 263.10 directly prohibits the distribution of such materials containing obscene performances, the interest sought to be vindicated is already adequately protected by these provisions.[17] Indeed, § 263.15 covers the very same conduct proscribed by § 263.10 except that the latter includes the constitutionally necessary element of obscenity.

Petitioner repeatedly argues that these provisions are inadequate or ineffective and, therefore, § 263.15 is the only "effective" means available, thus it is no greater than is essential to promote the interest sought to be protected (Petitioner's Brief, pp. 7-8, 12). Their claims, however, are not only self-serving but unfounded and unproven.[18]

It is odd that the petitioner argues on the one hand that the only effective way to halt the "evil" conduct is by banning distribution of representations of "sexual conduct" through the provisions of § 263.15.[19] However, in contradiction, it later

[17]Section 263.05 was recently upheld as constitutional, the courts observing *inter alia* that it, unlike § 263.15, did not infringe upon areas of protected speech. *People v. Weiner*, N.Y.L.J. 11/19/81, Nastasi, J.; *People v. Folk*, N.Y.L.J. 7/10/81.

[18]In *Graham v. Hill*, 444 F.Supp. 584 (W.D. Tex. 1978) a law similar to § 263.15 was struck down for its constitutional infringement. There, the court, faced with a similar claim regarding the necessity of such an overly broad enactment to achieve the declared state purpose, emphasized:

> "[T]his holding does not leave Texas without a means of dealing with the problem of child pornography, quite apart from enforcement of [the invalidated section]. Other of the state's criminal obscenity statutes are addressed to the exploitation of minors in the creation of pornographic materials, and the state has the authority under those laws to prosecute persons who actually use minors in the production or dissemination of obsence materials or performances" (*Id.* at 594).

[19]Petitioner states "prohibiting distribution of the product discourages distributors from selling it and thereby decreases the profits of the producers" (Petitioner's Brief, p. 17).

claims that similar attempts to curb distribution in order to discourage the dissemination of obscenity have failed. (Pet. Brief, p. 20). Thus, by its own admission, lawful restrictions on distribution fail to effectively strike at the heart of the problem as defined. It is for this reason that the more logical, direct and lawful method remains, the actual criminalization of the root conduct.

The petitioner proclaims that this Court's test in *Miller v. California*, 413 U.S. 15 (1973), is inadequate because obscenity convictions are allegedly difficult to obtain (Petitioner's Brief, pp. 8, 21-22). No proof of this *ipse dixit* claim, however, can be found in the record. The fact that the respondent was not convicted under § 263.10 does not attest to the petitioner's contentions since the jury may have reached its verdict because it was unconvinced by the prosecution's witnesses, or because it felt that a conviction under § 263.10 would constitute double punishment since that section contains all the elements of § 263.15. The failure to convict under § 263.10 may also be attributed to the strategical decision to prosecute these films from the standpoint of the average "adult" as opposed to other available methods. *See, e.g., Manual Enterprises v. Day*, 370 U.S. 478 (1962); New York Penal Law, Vol. 39; § 235.05(1) [McKinney].

Moreover, assuming *arguendo* the truth of petitioner's assumptions regarding the difficulty of obscenity prosecutions, is this not as it should be when First Amendment freedoms are hanging in the balance? What the petitioner may view as a prosecutorial hindrance is in reality a constitutional safeguard. Perhaps, in certain locations or communities, obscenity convictions are "difficult" to obtain, and properly so, but that is certainly not synonymous with a claim that they cannot be obtained, and nothing in this record supports a contrary conclusion.[20]

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[20]Indeed, one of the "studies" relied upon by the petitioner notes that convictions under *Miller* have not decreased when the materials presented involve children. Project, *An Empirical Inquiry into the Effects of Miller v. California on the Control of Obscenity*, 52 N.Y.U.L. Rev. 810 (1977).

Clearly, neither our founding fathers, nor any decision of this Court has ever promised that it would not be hard work to maintain the delicate balance between claims of legitimate state interests and conflicting expressional rights. The pursuit of exceptions to the free expression rights of the First Amendment should indeed be a difficult task.

D. *The State has Failed to Demonstrate a Compelling, Substantial and Overriding Interest Which Justifies the Massive Infringement of Protected Expression Caused by Section 263.15.*

The State has failed to muster any prior decision of this Court where a *per se* exception was carved out of the First Amendment's zone of protection regardless of the circumstances of the speech or its societal worth. Accordingly, the petitioner seeks sanctuary for its newly conceived exception under the general rubric of a "compelling state interest — less restrictive alternative." This interest is variously expressed, but generally takes the form of preventing conduct which is "physically, pychologically and emotionally harmful" to children (Petitioner's Brief, pp. 14-15).

The protection of such interests has been offered to this Court in the past in attempts to justify the muffling of free expression, and on each occasion has been rejected.

Recently, in *Smith v. Daily Mail Publishing Co.*, 443 U.S. 97 (1979), a state law banned the publication of the names of juvenile offenders based upon an assertedly compelling interest designed to foster rehabilitation, avoidance of future anti-social conduct, and unfavorable employment consequences (*Id.* at 104). Nevertheless, in an opinion by Chief Justice Burger writing for a nearly unanimous court, the teachings of *Davis v. Alaska*, 415 U.S. 308 (1974), were drawn upon to reject the state's interest in protecting juveniles in favor of preserving the constitutional right at stake. Similarly, in *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469 (1975), a statute based upon a professed state interest similar to that advanced here.

prohibiting the publication of the names of youthful rape victims to avoid numerous stated consequences, was voided as not being based upon an overriding compelling state interest.

It is also no answer to suggest that rights of free expression should depend upon the good faith judgment of the police to forego arrest for the distribution of legitimate scientific or educational works, or that a distributor can always defend a felony indictment on the basis that the statute is unconstitutional as applied to the facts of his case (Pet. Brief, p. 26). This Court has never condoned such an unsatisfactory substitute for the precise regulations necessary in the First Amendment area since "'[t]he threat of sanctions may deter . . . almost as potently as the actual application of sanctions' *NAACP v. Button*, 371 U.S. 415, 453 . . . [1963]" *Dombrowski v. Pfister*, 380 U.S. 479, 486 [1965].

E. *Contraband and Trafficking Statutes are Inapposite Analogies to Legislation Which Restricts Free Speech and, Unlike Those Provisions Section 263.15 Does Not Require a Violator to Play a Part in the Underlying Illegalities, and Since Section 263.15 Punishes Even Where there is No Underlying Illegality.*

Amicus curia Covenant House attempts to analogize Section 263.15 to three federal trafficking statutes: 18 U.S.C. § 2511(1)(c), which forbids the disclosure of information obtained through illegal wiretapping; 18 U.S.C. § 1952, which prohibits the promotion of racketeering; and 18 U.S.C. § 1084(a), which outlaws the transmission of wagering information.

In each instance, however, the offending disseminator must have been involved in the underlying criminal conduct or an integral part thereof: illegal wiretapping under § 2511(1)(c), racketeering under § 1952, and wagering under § 1084(a). *See United States v. Barbieri*, 614 F.2d 715, 717 (10th Cir. 1980),

(interpreting 18 U.S.C. § 1952); *Kelly v. Illinois Bell Telephone Co.*, 210 F.Supp. 456 (N.D.Ill. 1962), *aff'd*, 325 F.2d 148 (7th Cir. 1963).

Section 1084(a) requires on its face that the transmittor be, "engaged in the business of betting and wagering", which underlying conduct is unlawful. Moreover, it creates a specific exception for the legitimate uses of wagering information through § 1084(b) which, accordingly, rescues it from the vice of overbreadth.

These statutes require that the distribution of the information be an integral part of the underlying crime. *See United States v. Cerone*, 452 F.2d 274, 286 (7th Cir. 1971), *cert. denied*, 405 U.S. 964 (1972). Section 263.15, on the other hand, still punishes even where the publisher obtains his material quite lawfully.

Under 18 U.S.C. § 2511(1)(c) disclosure is criminal only when the distributor knows that the information he distributes is illegal due to the fact that it was improperly intercepted under subsection (1)(a) of § 2511. Thus, a crime must already have been committed and the distributor or publisher must have knowledge of this fact. *See Smith v. California*, 361 U.S. 147 (1960).

It is clear that in each instance there must be a predicate illegality and thereafter disclosure or transmission of this illegal information. Under 18 U.S.C. § 2511(1)(c), for example, if the overhearing of the communication was itself legal, *i.e.*, there was no violation of subsection (a), then disclosure of this information does not violate subsection (c) of § 2511(1). *See United States v. Harpel*, 493 F.2d 346, 350 (10th Cir. 1974). Furthermore, under §2511(1)(c), the content of the transmission is irrelevant. Whereas, under New York Penal Law § 263.15 it is only the distribution of materials containing adolescent sexual conduct which is criminalized.

The New York Legislature made no allowance for the intent of the distributor (with the intent to further conduct proscribed by §§ 263.05 or 263.10) or for the context within which the distribution occurs (*e.g.*, distribution of sexual performances by children for purposes of criminal investigation, scientific or medical study, etc.). Thus, the First Amendment claims of those actually engaged in criminal conduct can, of course, be legitimately rejected, but not those of legitimate book publishers and other writers and distributors of nonobscene, constitutionally protected materials. As one court noted in interpreting 18 U.S.C. § 1952:

> "It is clear that speech or conduct ordinarily protected by the Constitution may lose that protection *because of the intent of the speaker or actor or the context in which it occurs. E.g. Ginzburg v. United States*, 383 U.S. 463, 86 Sup. Ct. 942, 16 L.Ed. 31 (1966). The communication of opinions as to the outcome of future athletic contests may not threaten valid community interests *in other contexts*, but such communication clearly threatens legitimate community interest when it occurs as part of an illegal gambling operation crossing state borders" *(United States v. Cerone*, 452 F.2d at 286; emphasis added).

Section 263.15 takes no account of context or intent. It therefore touches solely upon protected speech in its overbroad sweep. This makes § 263.15 a statute of a different species from the trafficking legislation employed by petitioner. An analogy between § 263.15 and these contraband or trafficking statutes merely illustrates further the unconstitutionally overbroad nature of New York Penal Law § 263.15.

Conclusion

Legislation has never been upheld because it was passed with the best of intentions or in earnest. The well-meaning actions of our legislators are no substitute for the continuation of this Court's constitutionally necessary policy of subjecting all assaults upon the citadel of the First Amendment to the most exacting and rigorous standards.

In the wasteland of exceptions to the guarantee of free speech, a proscription has only been established when it was determined to be based upon a standard which permitted consideration of, and allowance for, the context of the expression and its capacity for promoting or expounding ideas, information or matters of social value. To uphold this statute would signal an abandonment of this long-standing commitment and would constitute what may be the first step in the demise of the First Amendment. To this invitation to erode sound precedent, this Court should, as it has in the past, bark a resounding "No!"

For all the foregoing reasons, the judgment of the New York Court of Appeals should be affirmed.

Respectfully submitted,

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APPENDIX
Text of Constitutional Provisions and Statutes Involved

Constitutional and Statutory Provisions Involved

The First Amendment of the United States Constitution provides, in pertinent part:

> Congress shall make no law . . . abridging the freedom of speech, or of the press. . . .

The Fourteenth Amendment of the United States Constitution provides, in pertinent part:

> [N]or shall any State deprive any person of life, liberty or property, without due process of law . . . .

The relevant sections of Article 263 of the New York Penal Law provide:

> §263.00 *Definitions*
>
> As used in this article the following definitions shall apply:
>
> 1. "Sexual performance" means any performance or part thereof which includes sexual conduct by a child less than sixteen years of age.
>
> 2. "Obscene sexual performance" means any performance which includes sexual conduct by a child less than sixteen years of age in any material which is obscene, as such term is defined in section 235.00 of this chapter.
>
> 3. "Sexual conduct" means actual or simulated sexual intercourse, deviate sexual intercourse, sexual bestiality, masturbation, sado-masochistic abuse, or lewd exhibition of the genitals.
>
> 4. "Performance" means any play, motion picture, photograph or dance. Performance also means any

other visual representation exhibited before an audience.

5. "Promote" means to procure, manufacture, issue, sell, give, provide, lend, mail, deliver, transfer, transmute, publish, distribute, circulate, disseminate, present, exhibit or advertise, or to offer or agree to do the same.

6. "Simulated" means the explicit depiction of any of the conduct set forth in subdivision three of this section which creates the appearance of such conduct and which exhibits any uncovered portion of the breasts, genitals or buttocks.

7. "Deviate sexual intercourse" means the conduct defined by subdivision two of section 130.00 of this chapter.

8. "Sado-masochistic abuse" means the conduct defined in subdivision five of section 235.20 of this chapter.

§263.05 *Use of a child in a sexual performance*

A person is guilty of the use of a child in a sexual performance if knowing the character and content thereof he employs, authorizes or induces a child less than sixteen years of age to engage in a sexual performance or being a parent, legal guardian or custodian of such child, he consents to the participation by such child in a sexual performance.

Use of a child in a sexual performance is a class C felony.

§263.10 *Promoting an obscene sexual performance by a child*

A person is guilty of promoting an obscene sexual performance by a child when, knowing the character

and content thereof, he produces, directs or promotes any obscene performance which includes sexual conduct by a child less than sixteen years of age.

Promoting an obscene sexual performance by a child is a class D felony.

§263.15 *Promoting a sexual performance by a child*

A person is guilty of promoting a sexual performance by a child when, knowing the character and content thereof, he produces, directs or promotes any performance which includes sexual conduct by a child less than sixteen years of age.

Promoting a sexual performance by a child is a class D felony.

No. 81-55

Supreme Court, U.S.
FILED
APR 17 1982
ALEXANDER L. STEVAS
CLERK

IN THE

Supreme Court of the United States

October Term, 1981

THE PEOPLE OF THE STATE OF NEW YORK,

Petitioner,

against

PAUL IRA FERBER,

Respondent.

On Writ of Certiorari to the New York State Court of Appeals

REPLY BRIEF FOR PETITIONER

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No. 81-55

IN THE

Supreme Court of the United States

October Term, 1981

THE PEOPLE OF THE STATE OF NEW YORK,

Petitioner,

against

PAUL IRA FERBER,

Respondent.

On Writ of Certiorari to the New York State Court of Appeals

REPLY BRIEF FOR PETITIONER

Simply because the First Amendment is involved in this case, respondent calls for a Pavlovian response to the constitutionality of New York's statute and urges this Court to "bark a resounding No." Brief for Respondent: 29. That kind of response, however, is no substitute for sound analysis. As seen from our main brief, such analysis demonstrates that New York's prohibition of the dissemination of materials depicting the sexual conduct of children is the least restrictive and most effective manner to further the compelling interest in protecting children from people who sexually exploit them in quest of profit.

In contrast, the analysis of respondent and *amici* publishers[1] is strikingly deficient in four major respects. First, they fail to comprehend the seriousness of the harm involved and thus fail to appreciate the legislative purpose in prohibiting the dissemination of the materials in question. Second, they fail to understand the reasoning which is at the foundation of the Legislature's determination to prohibit dissemination without respect to the obscene nature of that material. Third, they misconstrue the statute and thus erroneously conclude that it restricts speech in an unconstitutional manner. Fourth, they misapprehend the law of overbreadth, by overlooking completely the significance of *Broadrick* v. *Oklahoma*, 413 U.S. 601 (1973).

(1) Respondent and *amici* publishers fail to comprehend the harm to children who are made to engage in any and every kind of sexual conduct, and thus fail to appreciate the legislative purpose in prohibiting the dissemination of materials depicting that conduct.

At the outset, there is no doubt, despite the silence of *amici* publishers and respondent, that the state interest in protecting children from sexual abuse is "urgent" (*Lassiter* v. *Department of Social Services*, 452 U.S. 18, 27 [1981]), and "transcendent." *Ginsberg* v. *New York*, 390 U.S. 629, 640 (1968). The New York Legislature determined that children are harmed and abused when they are made, for example, to engage in sex with animals, with

1. In this reply brief the various organizations composing the *amici* arguing against the statute's constitutionality will be referred to as *amici* publishers. This is to distinguish them from the other *amici* in this case who have argued in favor of the statute's constitutionality.

adults, or with other children. The legislative judgment seems unexceptionable. *See* Brief for Petitioner: Appendix II at 9a-15a.

In an attempt to demonstrate the inadequacy of that compelling state interest, respondent (p. 25) and *amici* publishers (p. 20) mistakenly rely on *Smith* v. *Daily Mail Publishing Co.*, 443 U.S. 97 (1979), and *Cox Broadcasting Corp.* v. *Cohn*, 420 U.S. 469 (1975). In the *Smith* case, this Court struck down a West Virginia statute which made it a crime for a newspaper to publish, without judicial approval, the name of a youth charged as a juvenile offender. In *Cox*, this Court held invalid a Georgia statute which made it a misdemeanor to publish or broadcast the name or identity of a rape victim. As Chief Justice Burger observed for the Court in *Smith*, these cases stand for the proposition "that if a newspaper lawfully obtains truthful information about a matter of public significance, the state officials may not constitutionally punish publication of the information absent a need of the highest order." *Smith* v. *Daily Mail Publishing Co.*, 443 U.S. at 103-104. Here, of course, the prohibited materials do not contain news concerning matters of public significance, and are not generally disseminated by the news media. More importantly, here the state interest is more substantial than those supporting the statutes under scrutiny in the *Cox* and *Smith* cases. While publishing the name of a juvenile offender, or a rape victim, surely causes harm, it does not lead to more delinquency or to more rapes. On the other hand, the profitable dissemination of child pornography creates both a supply and demand for such materials, and thus inevitably leads to the large-scale sexual abuse of children. Prevention of that abuse is, indeed, a state interest of the "highest order."

In deciding on how best to protect children from sexual abuse, the New York Legislature started from the premise that it was unlawful to make children engage in sexual conduct. Despite the apparent difficulty which respondent and *amici* publishers have in accepting this premise, no person has the constitutional right to abuse children, regardless of whether that person is a photographer, a movie mogul, or an artist. *See* Brief for Petitioner: 11-15; *see also Griffin* v. *State*, —— Fla. ——, 396 So. 2d 152, 160 (1981) (Sundberg, C.J., concurring); *Campagno* v. *Florida*, — Fla. App. —, —— So. 2d —— (July 1, 1981), *cert. denied*, —— U.S. —— (Jan. 18, 1982); Note, *Protection of Children from Use in Pornography: Toward Constitutional and Enforceable Legislation*, 12 U. Mich. J.L. Ref. 295, 310 (1979). At pages 13, 14 and 15 of his brief, respondent seems to contend that in some jurisdictions it is not unlawful to produce materials by making a child engage in sexual intercourse, sexual bestiality, masturbation, sado-masochistic abuse or sodomy, or to make a child appear naked and explicitly simulate any such conduct. *See also* Brief for *Amici* Publishers: 29. We know of no jurisdiction in which it is lawful to make children engage in such conduct and await anxiously their identification by respondent.

In recognizing the need to ban dissemination of materials depicting the sexual abuse of children, as well as prohibiting the abuse itself, New York, like twenty-one other states,[2] concluded that prohibiting only the direct

2. At page 13 n.4 of our main brief we said that there are only nineteen states which have similar dissemination statutes. Both Florida, Fla. Stat. Ann. §847.014, and Utah, Utah Crim. Code §76-10-1206.5(3), should be added to that list, bringing the total to 21 states in addition to New York. Further, Idaho was omitted from the list of states which do not have a dissemination statute but have only a statute which prohibits sexual use of a child. Idaho Code §44-1306.

sexual abuse of children by producers of pornography could not effectively protect children.

Unfortunately, *amici* publishers never come to grips with the New York Legislature's determinations which led to the prohibition on dissemination. Respondent, who was convicted of such dissemination, also scrupulously avoids these determinations by resorting to characterizing petitioner's analysis as "ipse dixit," "allegations of fact," and "alleged truisms" (Brief for Respondent: 7 n.1, 22 n.16), while at the same time piously announcing that he "joins in the state's concern for our young people." Brief for Respondent: 4.

Those characterizations, however, cannot alter the fact that, as found by the Legislature, prohibiting only the abuse of children and not the dissemination of the products of the abuse offers no real protection for children. To satisfy the commercial market's demand for "kiddie pornography," producers make children engage in any and every kind of sexual conduct. *See* Brief for Petitioner: 6a n.8. The production is done secretly; it is extremely difficult, if not impossible, to discover production locations or identify producers. *See* Brief for Petitioner: 19 n.9. Moreover, the dissemination of this pornography is a highly lucrative business which encourages people to seek quick high profits by producing more materials, leading, of course, to more abuse of more children. Put simply, profitable dissemination of the prohibited materials encourages their production. To be sure, this is a determination which is difficult to support by empirical data. *See* Brief for Respondent: 19. Nonetheless, it is based on common sense, sound economic theory,

the experience of law enforcement officials and the opinions of other experts. *See* Brief for Petitioner: 19-20 esp. n.9.

At page 19, respondent asserts, however, that the "unproven assumption" that prohibiting dissemination will discourage production is a "dangerous doctrine." To prove his point, respondent says that this principle would justify a state prohibiting the dissemination of materials which depict, describe, or portray other evils such as murder, drug abuse, arms building or child labor. However, the distinctions between his examples and the instant statute are clear. This statute prohibits the dissemination of material which is produced by actual sexual abuse of a child performed for the very purpose of visually memorializing that abuse. Moreover, dissemination of that material leads to a demand for additional similar materials which, in turn, results in more abuse of children. On the other hand, in the examples posited by respondent, actual unlawful conduct is not undertaken for the very purpose of producing the visual memorialization of that conduct; nor is that memorialization disseminated to an ever increasing commercial market.

Significantly, only this past March 12th, in upholding the constitutionality of Virginia's child pornography statute, the Supreme Court of Virginia followed a rationale identical to that advanced by petitioner. *Freeman* v. *Commonwealth*, —— Va. ——, —— S.E.2d —— (March 12, 1982) (reprinted in this brief at pp. 1a-17a, *infra*):

> The destiny of the state rests with its minor citizens. Children are not always aware of the dangers to which they are exposed. Children may be led and misled. The state has a compelling interest, one central to its

> right to survive, in protecting its children from treatment it determines is physically or psychologically injurious to youth. The General Assembly has determined that the production and distribution of child pornography is such treatment. The statute it has enacted was intended to further the state's interest by punishing and deterring such treatment. As the data we have discussed shows, the legislature was justified in concluding that the process of production from which the harm flows cannot effectively be curtailed unless the profit motive is contained (*id.* at 7a).

The Virginia statute at issue in *Freeman* bans distribution of child pornography only if it is "obscene for children." Va. Code §18.2-374.1. Notably, in rejecting a First Amendment challenge to that statute, the Virginia court did not rely on the fact that the statute reached only material which is obscene for children. The court did not rely on the child obscenity standard because it recognized that a state cannot prohibit dissemination to adults of materials which are obscene only for children. *See Ginsberg* v. *New York*, 390 U.S. at 634-35; *Butler* v. *Michigan*, 352 U.S. 380, 383-84 (1957). Instead, the court held the ban on child pornography constitutional because it was supported by an interest far greater than those which support obscenity statutes. That interest is the compelling need to protect children from sexual abuse in the production of child pornography. Thus, while the Virginia statute prohibited only the dissemination of material which was obscene for children, the rationale of the decision applies with equal force to the New York statute, which bans the dissemination of material

depicting the sexual conduct of children, regardless of the material's obscenity for children.[3]

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3. Unlike the Virginia court, both the New York Court of Appeals in the instant case, and the Hawaii Circuit Court in *State* v. *Shingaki*, —— Hawaii Cir. —— (April 27, 1981), in declaring their respective statutes unconstitutional merely stated in conclusory fashion that the state may prohibit only the dissemination of obscenity. Put simply, neither decision is particularly persuasive. *See* Brief for Petitioner: 9-32.

Respondent (p. 14 n.11) and *amici* publishers (p. 11 n.13) both state that in *St. Martins Press, Inc.* v. *Carey*, 440 F. Supp. 1196 (S.D.N.Y. 1977), *rev'd on other grounds*, 605 F.2d 41 (2d Cir. 1979), the district court held the New York statute unconstitutional. The district court believed that the most persuasive argument was that the statute violated substantive due process, not the First Amendment, because it could be read to prohibit dissemination of materials produced outside New York prior to the effective date of the statute. 440 F. Supp. at 1205. That concern, apparently based upon ex post facto principles and the extent of the state police power, is without merit. It is without merit because the dissemination sought to be prohibited occurs in New York after the effective date and the harm sought to be prevented is the abuse of children after the effective date. *See* Brief for Petitioner: 29-32. Notably, neither respondent nor *amici* publishers have seriously contended to the contrary.

Respondent (p. 23 n.18) also points to *Graham* v. *Hill*, 444 F. Supp. 584 (W.D. Tex. 1978), which he asserts held unconstitutional a "similar" Texas statute. Unfortunately, respondent fails to note that the Texas statute, Tex. Penal Code Ann. tit. 9, §43.25 (Vernon), was broader than that of New York because it prohibited the commercial dissemination of motion pictures or photographs depicting the sexual conduct of children, or depicting children observing sexual conduct. The basis for the district court's decision was that portion of the Texas statute dealing with children merely observing sexual conduct, 444 F. Supp. at 592, which is not contained in the New York statute. Notably, in its opinion the court stated that "[if] the statute was limited to prohibiting the depicting of minors actually engaged in sexual conduct, . . . the court would likely have no hesitation in declaring its constitutionality." *Id.* Subsequently, Texas passed that very kind of statute. Tex. Penal Code Ann. tit. 9, §43.25(e) (Vernon).

(2) In not requiring proof of obscenity, the New York Legislature justifiably concluded that such a requirement would impair substantially the effectiveness of a prohibition on dissemination, thereby resulting in less protection of children.

The New York Legislature, unlike the Virginia General Assembly, determined that children are abused by being made to engage in various kinds of sexual conduct regardless of whether the visual representation of that abuse is memorialized in a book or motion picture which considered as a whole is not obscene for children. *See* Brief for Petitioner: 22. Again, the conclusion seems unexceptionable, and respondent and *amici* publishers are silent. However, each argues that directly prohibiting the producer from making children engage in sexual conduct (N.Y. Penal Law §263.15) and prohibiting dissemination of only obscene materials (N.Y. Penal Law §263.15) are alternatives which sufficiently protect children. Those arguments are fully rebutted at pages 19-23 of the main brief for petitioner.[4]

In this regard, at pages 23-24 of his brief, respondent argues that petitioner contradicts itself by contending that section 263.15 could be effective, while at the same time, contending that obscenity statutes are ineffective. Re-

4. Nor is the Virginia statute, which prohibits the dissemination of materials obscene for children, sufficient to protect children. As seen from the discussion of expert testimony in the Virginia case (*see* pp. 14a-16a of this brief), the obscenity for children standard presents problems of application and definition similar to those presented by the ordinary obscenity standard. Those problems inhibit the deterrent effect of the statute. *See* Brief for Petitioner: 20-23. Further, children are still sexually abused in the production of material depicting sexual conduct which they are made to perform, regardless of whether that material is obscene for children.

spondent misses the point. Our argument is simply that obscenity statutes are ineffective deterrents because of problems inherent in obscenity prosecutions. Those problems are eliminated if proof of obscenity is not required.

Indeed, the difficulties in obscenity prosecutions are no better demonstrated than by respondent himself, when he contends that at his trial "the jury may have . . . [acquitted of the obscenity count] because it was unconvinced by the prosecution witnesses."[5] Brief for Respondent: 24. Those witnesses and defense witnesses were debating whether the films sold by respondent would appeal to the prurient interest of a specific scientifically definable group. The question whether such a definable group existed was, of course, irrelevant to the conviction under section 263.15, which has no obscenity requirement, and irrelevant, as well, to the state interest in protecting children.

The "definable group—prurient interest" issues are essential elements of an obscenity prosecution. Therefore, *amici* publishers engage in wistful speculation by suggesting that Ferber would have been convicted of disseminating an obscene film if the obscenity provisions (§263.10) were the only statute in the books. Brief for *Amici* Publishers: 22 n.24. Indeed, those, including *amici* publishers (pp. 7-8), who suggest that films which explicitly depict the sexual conduct of children will always come within the definition of obscenity, simply ignore the reality of obscenity prosecutions or fail to appreciate that the sexual abuse of children is not limited to depiction in obscene materials. Addition-

5. Another reason offered for the obscenity acquittal is the far-fetched speculation that the jury feared punishing respondent twice. Brief for Respondent: 24, Brief for *Amici* Publishers: 22 n.24.

ally, respondent's argument at page 24, n.20, that obscenity convictions after *Miller* v. *California*, 413 U.S. 15 (1973), have not decreased when the materials involved children, is perfectly consistent with our argument that substituting children for adults is hardly likely to lead to any more findings of obscenity. Brief for Petitioner: 21 n.10.

Finally, both respondent and *amici* publishers continually point to the obscenity decisions of this Court as being determinative of the present case. Those cases are not relevant because, as recognized by the Virginia Supreme Court, *Freeman* v. *Commonwealth*, slip op. at p. 7a, *infra*, the conventional ban on obscenity is based upon state interests which do not include protecting children from sexual abuse in the production of the materials disseminated. *See Paris Adult Theatre I* v. *Slaton*, 413 U.S. 49, 57-60 (1973).[6]

To say that a statute prohibiting the dissemination of materials produced by sexually abusing children must require proof of obscenity would afford no greater protection to children than that already provided by ordinary obscenity statutes. The compelling need to protect children authorized the Legislature to dispense with the requirement of obscenity and to prohibit the dissemination of materials

6. Just as *amici* publishers and respondent incorrectly rely on obscenity cases, they are completely mistaken in asserting that the state's argument in support of the dissemination statute, as opposed to the use statute, relies heavily on *United States* v. *O'Brien*, 391 U.S. 367 (1968). *Amici* Publishers: 16, Respondent: 20. The *O'Brien* case is cited but once by petitioner, at page 16, and then only in support of the use statute (§263.05), not the dissemination statute (§263.15). With respect to the dissemination statute, we contend it is constitutional only because the Legislature was entitled to decide that it is the least restrictive alternative to achieve the compelling state interest in protecting children from sexual abuse. Brief for Petitioner: 16.

depicting the sexual conduct of children. This prohibition is the least restrictive and most effective way to meet that compelling need.

(3) The misconstruction of the statute by *amici* publishers and respondent provides no reason to conclude that the statute is unconstitutionally overbroad or vague.

In misconstruing the statute in question, *amici* publishers characterize it as prohibiting the dissemination of non-obscene materials which simply depict "naked children." Brief for *Amici* Publishers: 6. In a similar vein, respondent describes the statute as prohibiting the distribution of material which merely "addresses adolescent sex in a visual format." Brief for Respondent: 12. Both descriptions fall far short of the mark. New York Penal Law Section 263.15 does not simply address "naked children" or "adolescent sex." Rather, the statute prohibits the dissemination of non-obscene sexually explicit materials which are produced by making children engage in "sexual intercourse, deviate sexual intercourse [sodomy], bestiality, masturbation, sado-masochistic abuse, or lewd exhibition of the genitals." N.Y. Penal Law §263.00(5). This definition of sexual conduct specifies with precision the materials which cannot be disseminated and confines the prohibition much more narrowly than is implied by terms such as "naked children" or "adolescent sex."

Focusing on the term "lewd exhibition of the genitals," at page 21, *amici* publishers contend that the statute is unconstitutionally overbroad because it would encompass

"medical, scientific or educational works which, as an essential part of their content, contain sexually related pictures or naked youths." In accompanying footnote 22 at page 21, *amici* publishers refer to five scientific or medical works as examples of the statute's overbreadth. The pages cited do contain pictures of the genitals of children. However, none of these pictures presents a "lewd exhibition of the genitals." True, that term is not defined by the statute. Still, the term "lewd exhibition of the genitals" is no stranger to the law; the term means more than mere nudity and describes a patently offensive, lascivious, lustful or obscene display. *See People* v. *Heller*, 33 N.Y.2d 314, 321, 328 (1973), *cert. denied*, 418 U.S. 944 (1974); *Miller* v. *California*, 413 U.S. at 25; *Jenkins* v. *Georgia*, 418 U.S. 153, 160 (1974); *United States* v. *12 200 ft. Reels of Film*, 413 U.S. 123, 130 n.7 (1973); *United States* v. *Various Articles of Obscene Merchandise*, 460 F. Supp. 826, 830 (S.D.N.Y. 1978), *aff'd* and *rev'd* in part, 600 F.2d 394, 406 (2d Cir. 1979); *see also Hamling* v. *United States*, 418 U.S. 87, 112, 118, 120-21 (1974). None of the pictures in the cited medical texts can even arguably be said to be lewd. Indeed it is absurd even to suggest that these books are within the statute.[7]

Nor can it be argued that this definition of lewd would be inconsistent with the legislative determination not to require proof of obscenity. *See* Brief for Respondent: 9 n.6. True, the New York Court of Appeals did refuse to

7. F. Falkner, Human Development, pp. 184-221 (1966); Waldo [Nelson], Textbook of Pediatrics, pp. 1567-1570, 1623-1630 (1979); A. Rudolph, Pediatrics, pp. 1328, 1608, 1678, 1713-14 (16th ed. 1977); J. Forfar and G. Arniel, Textbook of Paediatrics, pp. 1052-55, 1115 (1973); and F. Brimblecombe and A. Barltrop, Children in Health and Disease, pp. 176, 177, 200, 204, 206 (1st ed. 1978) (formerly Paterson's Sick Children, pp. 203, 206, 208).

construe the entire statute as requiring proof of obscenity because the Legislature made it clear that with respect to the entire statute, no obscenity requirement was intended. Exhibit A to Petition for Certiorari: 3a-4a. However, it is hardly inconsistent with the legislative purpose to define a "lewd display of the genitals" as meaning "a patently offensive, lascivious, lustful or obscene display," without requiring proof of obscenity with respect to the entire work or any of the other sexual conduct specified in the statute. This is especially so since the Legislature used the word "lewd" and that word is defined as "obscene." Black's Law Dictionary, p. 817 (5th ed. 1979); Webster's Third International Dictionary, p. 1301 (unabrd. 1971); *see also* cases cited at p. 13, *supra*.

Notably, *amici* publishers' main overbreadth argument deals only with scientific, medical and educational material. *See* Brief of *Amici* Publishers: 21. There is, however, but a passing reference by *amici* publishers to artistic works at page 7 n.9. In that footnote, *amici* publishers, while expressing a concern about the term "lewd exhibition of the genitals," point to several "serious compilations of artistic photographs." Nonetheless, as just noted, that term means something more than mere nudity; none of these works have pictures which could be described as lewd.[8] Again, it

8. *See,* Nude Photographs, 1850-1980, pp. 47, 78, 125 and 134 (C. Sullivan ed. 1980) (four photographs are of a single child simply standing nude); E.A. Ruby, The Human Figure: A Photographic Reference for Artists, pp. 309-317 (1974) (a series of innocent photographs of a two year old girl); The Family of Children, pp. 84-85 (J. Mason ed. 1977) (six photographs of naked children at play, but in a totally innocent and sometimes charming way); M. Mark, Falkland Road: Prostitutes of Bombay (1981) (two photographs of thirteen and fifteen year old prostitutes with only their breasts exposed; one photograph of two sons of prostitutes lying nude on a bed); D. Hamilton, Sisters (1973) (photographic story of two young sisters of an unknown age. Some of the photographs show the girls' breasts and one girl touching the other's breasts, but no genitalia is shown).

is absurd that they are even offered as examples. Notably, not one of the books proffered depicts any sexual conduct of a child under the age of sixteen.

At page 25 n.27, *amici* publishers also point to several "sex education" books, the dissemination of which they contend would be criminal under the New York statute. Again, *amici* publishers have, for the most part, based their conclusion on a misunderstanding of the term "lewd exhibition of the genitals," which as noted does not include mere nudity.[9] Moreover, it is clear that the vast majority of nude models in these works are over sixteen or are of an undeterminable age;[10] of course there can be no prosecution if age cannot be determined. Given the narrow definition of lewd exhibition of the genitals, and the ability to use models over the age of sixteen, it is not credible for *amici* publishers to argue at pages 25-28 that somehow the ban on dissemination of materials depicting children en-

9. *See*, S. Waxman, Growing Up Feeling Good: A Child's Introduction to Sexuality (1979) (two series of pictures of children getting dressed; one of a young girl, the other of a young boy. Two other pictures, one of a nude boy, the other of a nude girl, the age of each may be over sixteen); S. Waxman, What is a Girl? What is a Boy? (1976) (two photographs, one of a nude baby boy and the other of a nude baby girl; one photograph of a nude young boy, and another photograph of a nude two or three year old girl); M. Goldstein, E. Haeberle and W. McBride, The Sex Book: A Modern Pictorial Encyclopedia (1971) (pictures of nude children, some showing genitalia); W. McBride and Fleischhauer-Hardt, Show Me! (1975) (pictures of nude children, some touching their own genitals and one of a young girl simply touching the penis of a young boy); and G. Nass, R. Libby and M. Fisher, Sexual Choices (1981) (at page 241, photograph of a one or two year old girl playfully and innocently holding on to the penis of a boy of the same age; nude photographs of a single child at pages 39, 50 and 281 which do not show genitalia).

10. *See, e.g.*, Growing Up Feeling Good, *supra*, note 9 at pp. 30 and 34; The Sex Book: A Modern Pictorial Encyclopedia, *supra*, note 9, at pp. 26, 31, 37, 83, 85, 86, 130-31; Show Me!, *supra*, note 9, at pp. 88-89, 100-01, 104-05, 106-07, 112-13, 158-60, 166-69.

gaged in sexual conduct will preclude parents from educating their children about sexual matters.

Additionally, respondent (p. 13) points to two popular movies, "Pretty Baby," and "The Exorcist," as works which would be encompassed by the New York statute. Of course, those films have not yet been made available to the Court; indeed, counsel for the respondent does not even state that he has seen them, and admitted that he had not when making the identical argument to the New York Court of Appeals. Apparently, he still has not seen them, because in "Pretty Baby" no sex act of a child is shown. The only scenes depicting child nudity are one in which a baby is nursed by her mother, one in which a young girl (Brooke Shields) poses nude for a photographer and another scene in which she is getting out of a bathtub. In the bathtub and posing scenes, her breasts and buttocks are exposed but there is no display of genitalia. In "The Exorcist," there is no lewd display of the genitals of a child. The only sex act even remotely suggested occurs for a brief second when it is made to appear that a young girl (Linda Blair), who is fully covered in a sheet or nightgown, thrusts a crucifix between her legs under the gown. It is impossible to say that any actual sexual conduct is taking place in this scene; even if it could be said that sexual conduct was being "simulated," that simulation does not fit within the statute because it is not accompanied by any nudity. *See* N.Y. Penal Law §263.00(6). Significantly, with respect to motion pictures, respondent has failed to dispute that the alternate methods of production, discussed in our main brief at page 25, permit production of movies portraying the sexual conduct of children without making children engage in or simulate that conduct.

Even if the production or dissemination of a few works of arguable value were discouraged by the New York statute, that would be a small price to pay for protecting children from substantial evil. Yet, the failure of respondent and *amici* publishers to identify books and films which they believe deserve protection, but which would be encompassed by the statute, is a tell-tale sign that their First Amendment concerns are divorced from reality. It is significant that among the *amici* are publishers who, presumably, have access to virtually all books ever published. And of all the books ever published, they are able to point to so few which they opine could be encompassed by New York's statute, even though they maintain that the statute is so substantially overbroad.[11] Of these works, it is certain that most are not included within the statute. Nor, in fact, is it clear that any one of them depicts sexual activity or lewd exhibition of the genitals within the meaning of the statute. *See* notes 7-9, pp. 13-15, *supra*. That no books or movies have been found is not surprising, because ideas about the sexual conduct of children can be and almost always are expressed without making a child engage in such conduct. Finally, in the unlikely event that a few such books or movies exist or will exist in the future, case by case adjudication would adequately protect them.

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11. Interestingly, research by *amici* publishers and respondent has not discovered any pictorial representations of the New Guinean "fertility rites," referred to in the Court of Appeals' opinion. *See* App. A to Petition for Certiorari at 5a.

(4) The overbreadth problem, if any, can be dealt with on a case by case basis, and even if the statute is overbroad with respect to a distinct category of cases, the state courts must first be given an opportunity to give the statute a limiting construction.

As *amici* publishers correctly point out, petitioner concedes that the statute may well be overbroad with respect to certain kinds of dissemination, even though the content of the material itself is not protected. For example, the New York statute, read literally, would apply to news media reports on the "kiddie porn" industry if sexually explicit materials were actually reprinted or broadcast. Similarly, at page 13 n.8, respondent argues that the statute is overbroad because it encompasses dissemination by well-intentioned people to a person involved in the legislative, judicial, or executive branches of government, or even to the news media. In such circumstances, the possibility of prosecution is so remote, indeed virtually non-existent, that no such activity would be deterred. Moreover, if there should ever be a prosecution of constitutionally protected dissemination, then, as *Broadrick* v. *Oklahoma*, 413 U.S. 601 (1973), teaches, a case by case approach can effectively deal with the problem of overbreadth. Such an approach protects against unconstitutional applications of the statute while permitting the statute to protect children from sexual abuse by prohibiting the vast majority of dissemination which feeds both the demand and supply sides of the market.

The Oklahoma statute challenged in the *Broadrick* case prohibited public employees from engaging in all

"political activity." This Court recognized, however, that the Oklahoma statute could constitutionally encompass a "substantial spectrum" of partisan political activity (*id.* at 616), even though on its face the statute also covered political activity which could not be prohibited because it was constitutionally protected. *Id.* at 617-18. Indeed, even though political activity is at the very core of the values protected by the First Amendment, still, a case by case analysis of fact situations could cure whatever overbreadth existed. Neither *amici* publishers nor respondent gives any reason why a similar approach does not recommend itself to the section 263.15 ban on dissemination of materials which certainly have no greater First Amendment value than non-partisan political activity. *See Erznoznik* v. *City of Jacksonville,* 422 U.S. 205, 216 (1975). By analogy to *Broadrick,* the New York statute is constitutional on its face because it encompasses a substantial spectrum of unprotected dissemination even though on its face it also covers certain limited kinds of dissemination which are protected by the First Amendment.

Returning to the alleged overbreadth problem with respect to scientific, medical or educational works which include depictions of the sexual conduct of children as an "essential part of their content" (Brief for *Amici* Publishers: 21), a similar approach recommends itself. The statute encompasses a substantial spectrum of unprotected sexually explicit material depicting children. There is no sound reason why, as with the limited category of political activity involved in *Broadrick,* a case by case approach could not deal with the limited category of such scientific, medical or educational materials. This is especially so in light of the paucity of examples offered by *amici* publishers,

which makes it clear that this statute will have neither a real nor a substantial deterrent effect on legitimate expression. *See Erznoznik* v. *City of Jacksonville*, 422 U.S. at 216.

Finally, even assuming that a case by case approach is not appropriate for that limited category of materials, the New York Court of Appeals should be afforded an opportunity to construe the statute in a manner which would overcome any overbreadth problem. When this case was before that court it found no limiting construction possible because it believed that a state could prohibit the dissemination of materials explicitly depicting children engaged in sexual conduct only if the materials are obscene. Our briefs make it clear that the state court erred in that regard. If this Court should so hold, then the case should be reversed and remanded for reconsideration in accord with the principles enunciated.

Conclusion

The judgment appealed from should be reversed.

Respectfully submitted,

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April 16, 1982

ADDENDUM

Opinion of the Supreme Court of Virginia
March 12, 1982

Present:

Carrico, C.J., Cochran, Poff, Compton, Thompson, and Stephenson, JJ., and Harrison, Retired Justice

Record No. 810480

JOHN MIDDLETON FREEMAN

v

COMMONWEALTH OF VIRGINIA

POFF, J.

A jury convicted John Middleton Freeman of the charge that he "did . . . feloniously produce or make sexually explicit visual material which has as a subject a person less than eighteen years of age," Code § 18.2-374.1(B)(2), and fixed his punishment at two years in the penitentiary. Appealing from an order entered January 12, 1981, confirming the verdict, Freeman contends that the statute, read as a whole, is unconstitutionally overbroad and vague.

In the spring and summer of 1979, Freeman, an unmarried 61-year-old free-lance artist, befriended J.M., an at-

tractive five-year-old girl who played in the neighborhood where Freeman lived with his mother. On at least two occasions, he took snapshots of J.M., some in black and white and some in color. In some, J.M. was shown partially or wholly nude with her genitals exposed in part or in full. Four of the five introduced in evidence depict her posing in erotic postures on Freeman's bed.

In September, Freeman approached J.M.'s mother and showed her the pictures. Mrs. M. testified that Freeman told her "that he had already shown them to a man in New York, a publisher, and that he was going to trade him rights to publish his book for the pictures. He wanted my approval". Mrs. M. did not approve and demanded the pictures. Freeman refused to give them to her but said he would sell them to her.

Testifying in his own defense, Freeman characterized J.M. as a precocious child with an active sexual curiosity. He said that she made sexual advances to him and asked him to photograph her in nude "Playboy" poses. He agreed, but only to make a record of her conduct in order to prove to her mother how "promiscuous" she was. He denied that he had shown the pictures to anyone other than Mrs. M., and he explained that all he asked as the price of the snapshots was the cost he incurred in making them. He acknowledged, however, that he had written a book of "fantasies" entitled "Irish Tales for Adult Children" which had been "accepted by publishers in New York." Freeman had "dedicated" the book to J.M. The publisher told him that "we will publish it for free but you will get royalties once it gets out."

The legislative goal of the statute Freeman attacks is basic to our constitutional analysis, and we examine the circumstances leading to its enactment. The evil the statute was designed to control is vividly described in published reports of private and governmental bodies which have been collected in numerous scholarly essays.[1] Drawing upon such works, we learn that so-called "sexploitation" of children grew to epidemic proportions in the decade of the 1970's. The American conscience was shocked by public media accounts of sexual exploitation of children by adults. What came to be known as "kiddie porn" in the underground obscenity market began to appear openly on bookstore shelves. Magazines displayed pictures of children engaged in activities ranging from lewd poses to intercourse, fellatio, cunnilingus, masturbation, rape, incest, and sado-masochism. According to one official estimate, child pornography has become the merchandise of a commercial enterprise grossing more than half a billion dollars a year.

Producers, publishers, and other merchandisers are not the only profiteers. Parents in necessitous circumstances often "rent" their children as models for photographers. And profit is not the only motive. Pedophiles, adults who have a sexual preference for children, derive an aberrant gratification from inducing children to perform sexual acts before a camera and looking at the pictures.

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1. *See, e.g.*, Comment, *Protection of Children from Use in Pornography: Toward Constitutional and Enforceable Legislation*, 12 U. Mich. J. L. Ref. 295 (1979); Comment, *Preying on Playgrounds: The Sexploitation of Children in Pornography and Prostitution*, 5 Pepperdine L. Rev. 809 (1978); Note, *Child Pornography: A New Rule for the Obscenity Doctrine*, 1978 U. Ill. L. F. 711.

Whatever the photographers' motivations, and however great the illicit profit involved, society's chief concern is the injury inflicted upon its children in the process of production and sale. Typically, the photographer's model is the most vulnerable member of the juvenile population—the very young and trusting, the abandoned child, the product of a broken home, the unemployed runaway, the teenager with a drug addiction to support.

The harm the child suffers takes many forms. In the course of inducing the child to pose, the photographer may engage his model in a variety of sexual acts, with or without the child's consent. Even if the child is not sexually abused physically, the experience it undergoes may leave lasting psychological scars. Once the photograph is developed, the photographer may use it to persuade other children that the conduct it depicts is a social norm. Thus, he may induce others to become models, and if he is a child molester, he may use the picture to arouse the sexual instincts of his victim. Finally, there is growing evidence of a reciprocal cause-and-effect relationship between child pornography and child prostitution, male and female, heterosexual and homosexual.

Responding to parental alarms and public outrage, lawmakers began searching for new ways of dealing with a new threat to children. Old laws were unequal to the challenge. Statutes criminalizing rape, sodomy, incest, and other forms of child abuse did not treat with the harm resulting from the production of child pornography. A producer of child pornography could be convicted of contributing to the delinquency of a minor, but conviction carried only a misdemeanor penalty. Congressional measures

criminalized the distribution but not the production of obscenity within the federal domain.

In the enactment of new laws, many states adopted the federal pattern. In Virginia, the General Assembly attacked the problem at its roots and in all its branches. Code § 18.2-374.1,[2] enacted near the end of the decade, focuses

2. § 18.2-374.1. Production, publication, sale, possession, etc., of obscene items involving children.—A. For the purposes of this article and article 4 (§ 18.2-362 et seq.) of this chapter, the term "sexually explicit visual material" means a picture, photograph, drawing, sculpture, motion picture film or similar visual representation which is obscene for children and which depicts nudity, sexual excitement, sexual conduct, sexual intercourse or sadomasochistic abuse, as defined in § 18.2-390, or a book, magazine or pamphlet which contains such a visual representation. An undeveloped photograph or similar visual material may be sexually explicit material notwithstanding that processing or other acts may be required to make its sexually explicit content apparent.

Sexually explicit visual material is "obscene for children" when the material meets all of the following criteria:

1. Considered as a whole, it appeals to the prurient interest of children as determined by the experience of children in the contemporary community.

2. It affronts contemporary standards of adults as to what is suitable matter for children.

3. Considered as a whole, it lacks serious literary, artistic, political and scientific value for children.

B. A person shall be guilty of a Class 6 felony who:

1. Accosts, entices or solicits a person less than eighteen years of age with intent to induce or force such person to perform in or be a subject of sexually explicit visual material;

2. Produces or makes or attempts or prepares to produce or make sexually explicit visual material which utilizes or has as a subject a person less than eighteen years of age; or

3. Who knowingly takes part in or participates in the filming, photographing or other reproduction of sexually explicit visual material which utilizes or has as a subject a person less than eighteen years of age; or

(footnote continued on next page)

upon child pornography. It relates only to "sexually explicit visual material" which "utilizes or has as a subject a person less than eighteen years of age" and which is "obscene for children". The Virginia statute criminalizes the distribution of such material as well as its production. But, reading the statute as a whole in light of the public concern which gave it birth, we believe the paramount legislative goal was to protect children from the harm they suffer when they are induced to become models for such materials, irrespective of the motive or intent of the offender.

We now consider whether the means employed by the statute are reasonably restricted to achieve its goal.

I. CONSTITUTIONAL OVERBREADTH

Is the statute an overbroad encroachment upon the First Amendment, as Freeman contends? It proscribes distribution of material which is "obscene for children". Ma-

---

4. Sells, distributes or gives away at wholesale or for resale sexually explicit visual material which utilizes or has as a subject a person less than eighteen years of age; or

5. Sells or distributes at retail or not for resale sexually explicit visual material which utilizes or has as a subject a person less than eighteen years of age.

C. A person shall be guilty of a Class 5 felony who knowingly finances or attempts or prepares to finance sexually explicit visual material which utilizes or has as a subject a person less than eighteen years of age.

D. For the purposes of this section a person who is depicted as or presents the appearance of being less than eighteen years of age in sexually explicit visual material is prima facie presumed to be less than eighteen years of age.

E. The provisions of this section shall be severable and, if any of its provisions shall be held unconstitutional by a court of competent jurisdiction, then the decision of such court shall not affect or impair any of the remaining provisions. (1979, c. 348.)

terial which may be obscene for children is not necessarily obscene for adults, even though it is pornographic. Distribution of such pornography to children may constitutionally be forbidden by law. *Ginsberg* v. *New York,* 390 U.S. 629 (1968). Distribution to adults can be proscribed only if the pornography is obscene by adult standards. *Roth* v. *United States,* 354 U.S. 476 (1957). Adults cannot be limited to reading or seeing only those things fit for children. *Butler* v. *Michigan,* 352 U.S. 380 (1957); *Goldstein* v. *Commonwealth,* 200 Va. 25, 104 S.E.2d 66 (1958).

The distribution proscription in the Virginia statute extends to distribution to adults of child pornography which may not be obscene for adults, and Freeman thinks that its reach is fatally overbroad. We do not think so.

The destiny of the state rests with its minor citizens. Children are not always aware of the dangers to which they are exposed. Children may be led and misled. The state has a compelling interest, one central to its right to survive, in protecting its children from treatment it determines is physically or psychologically injurious to youth. The General Assembly has determined that the production and distribution of child pornography is such treatment. The statute it has enacted was intended to further the state's interest by punishing and deterring such treatment. As the data we have discussed shows, the legislature was justified in concluding that the process of production from which the harm flows cannot effectively be curtailed unless the profit motive is contained. Whatever restriction the distribution penalties impose upon the First Amendment rights of adults who want to sell or view child pornography is merely

an effect incidental to the achievement of the goal the statute pursues.

> [A] government regulation is sufficiently justified if it is within the constitutional power of the Government; if it furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest.

United States v. *O'Brien*, 391 U.S. 367, 377 (1968). As Justice Black said in *Younger* v. *Harris*, 401 U.S. 37, 51 (1971),

> the existence of a "chilling effect," even in the area of First Amendment rights, has never been considered a sufficient basis, in and of itself, for prohibiting state action. Where a statute does not directly abridge free speech, but—while regulating a subject within the State's power—tends to have the incidental effect of inhibiting First Amendment rights, it is well settled that the statute can be upheld if the effect on speech is minor in relation to the need for control of the conduct and the lack of alternative means for doing so.

Freeman also contends that the statute is overbroad because, he says, it sweeps within its purview "artists and sculptors whose work requires no models at all more than imagination." The statute does not reach so far. The conduct it defines is penalized only when "a person less than eighteen years of age" has been used as a model in the production of child pornography. And, Freeman complains, "[t]here is no exception for parents or family." But he does not explain why a parent or relative has a First Amendment right superior to that of a stranger to use a juvenile member of the family as a model for the production of pornographic material.

II. CONSTITUTIONAL VAGUENESS

Freeman's vagueness arguments, mingled indiscriminately with his overbreadth charges, do not invoke any constitutional guarantee discretely. As we understand those arguments, he contends that certain words and phrases offend the Due Process Clause because "they provide inadequate notice to the public of what conduct is prohibited."

As Freeman's brief illustrates, due process vagueness and First Amendment overbreadth are sometimes functionally inter-related. If statutory language defining an offense is vague, those charged with enforcement may interpret and apply the language too broadly. By way of example, Freeman points to the word "nudity" as used in the definition of "sexually explicit visual material."

"[N]udity alone is not enough to make material legally obscene." *Jenkins* v. *Georgia,* 418 U.S. 153, 161 (1974). But the word "nudity" in subsection A does not exist in a statutory vacuum. The depiction of nudity is proscribed only if it is "obscene for children". Moreover, Code § 18.2-390(2) defines nudity, in part, as "a state of undress so as to expose the human male or female genitals". "Patently offensive representations or descriptions of . . . lewd exhibition of the genitals" are among the "plain examples of what a state statute could define for regulation". *Miller* v. *California,* 413 U.S. 15, 25 (1973). Such materials are not constitutionally protected if they "depict or describe patently offensive 'hard core' sexual conduct specifically defined by the regulating state law, as written or construed." *Id.* at 27. As we construe our statutes, material

depicting the lewd exhibition of a juvenile's genitals is "hard core" obscenity for children.

Freeman does not consider the pictures obscene, and he says that "there is no way for an adult citizen to predict" what material is "obscene for children". Hence, he finds that phrase constitutionally vague.

In a prosecution under Code § 18.2-374.1, the inquiry is whether the material in issue is obscene for children. If the evidence shows that it is, the offense is complete, and how the defendant may have regarded it is irrelevant. *See Rosen* v. *United States,* 161 U.S. 29, 41-42 (1896). The scienter requirement is satisfied if the defendant was aware of the nature of the material in issue, even if he did not know it was illegal.

> It is constitutionally sufficient that the prosecution show that a defendant had knowledge of the contents of the materials . . . and that he knew the character and nature of the materials. To require proof of a defendant's knowledge of the legal status of the materials would permit the defendant to avoid prosecution by simply claiming that he had not brushed up on the law. Such a formulation of the scienter requirement is required neither by the language of [the statute] nor by the Constitution.

Hamling v. *United States,* 418 U.S. 87, 123-124 (1974).

We find no merit in Freeman's argument that the "obscene for children" phrase is vague in that it requires the producer to "consider the possible obscenity with regard to all children without regard to age, sex or other factors." It may be true that what is obscene for one child is not obscene for another. But obscenity may be defined with

reference to a class more limited than the community at large. *Mishkin* v. *New York,* 383 U.S. 502 (1966) (deviant sexual class). And there is no constitutional requirement that all members of a defined class have the same levels of maturity or sensitivity or hold the same views. *Pinkus* v. *United States,* 436 U.S. 293 (1978). Indeed, it is the very diversity of viewpoint within the class which determines the average "contemporary community" standard.

In a related argument, Freeman suggests that the juvenile class is vague because it includes "not only juvenile models but any model who looks like a juvenile." He refers to subsection D of the statute which provides that "a person who is depicted as or presents the appearance of being less than eighteen years of age . . . is prima facie presumed to be less than eighteen years of age." We fail to see any due process implications in a rebuttable presumption which, by definition, does no more than shift the burden of going forward with the evidence.

One of the "guidelines" for determining what material is obscene for *adults* is "whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law." *Miller* v. *California,* 413 U.S. at 24. Freeman believes that, while the Virginia statute includes the other *Miller* guidelines, it is unconstitutionally vague and overbroad because the "patently offensive" guideline "has no counterpart in § 18.2-374.1."

"[L]ack of precision [in defining obscenity] is not itself offensive to the requirements of due process." *Roth* v. *United States,* 354 U.S. at 491. We see no real difference between sexual material which "affronts contemporary standards", § 18.2-374.1(A)(2), and material which por-

trays sex "in a patently offensive way". More to the point, we find nothing in the Constitution or case law which requires a child pornography statute to contain any particular counterpart of the judicial definition of adult obscenity. What is fit for adults is not necessarily fit for children. Child pornography which is not legally obscene for adults may be obscene for children. In the enactment of statutes to protect children exploited by adults in the production of pornography, legislatures are not constitutionally required to define obscenity by adult standards.

We reject Freeman's constitutional challanges, and we turn to the errors he assigns to certain evidentiary rulings.

III. EVIDENTIARY RULINGS

A. *Evidence Of Prior Offenses*

A police officer testified that Freeman had confessed that he made the pictures in evidence and that, on other occasions, he had fondled J.M., kissed her genitals, allowed her to handle and kiss his genitals, and masturbated in her presence. Freeman objected to the testimony as inadmissible evidence of prior crimes. The trial court overruled his objection but cautioned the jury that the officer's testimony could be considered as evidence "showing motive or purpose which the defendant may have gone about making the pictures" but was "not to be taken by you as being evidence that he committed the offense for which he is now on trial."

On appeal, Freeman maintains that the evidence should have been excluded as prejudicial, inflammatory, and ir-

relevant. "The act of fondling and the act of photographing," he says, "are totally different and an individual with a propensity for one is not necessarily going to have a propensity for the other."

Generally, evidence of other offenses is inadmissible to prove the offense charged at bar. *Cumbee* v. *Commonwealth*, 219 Va. 1132, 1137-38, 254 S.E.2d 112, 116 (1979). But the general rule yields to certain well-defined exceptions.

> Evidence of other offenses is admissible if it shows the conduct and feeling of the defendant toward his alleged victim, if it establishes prior relations between the parties, or if it tends to prove any relevant element of the offense charged.

Ryan v. *Commonwealth*, 219 Va. 439, 447, 247 S.E.2d 698, 704 (1978). *See also, Moore* v. *Commonwealth*, 222 Va. 72, 278 S.E.2d 822 (1981); *Gibson* v. *Commonwealth*, 216 Va. 412, 219 S.E.2d 845 (1975); *Kirkpatrick* v. *Commonwealth*, 211 Va. 269, 176 S.E.2d 802 (1970).

The officer's testimony shows Freeman's conduct and feeling toward J.M. and their prior relationship. And it tends to prove relevant elements of the offense charged against him.

The Commonwealth was required by the statute to prove as one of the elements of the offense that the pictures Freeman produced appealed to prurient interest. Freeman's sexual encounters with J.M. evince lascivious motivation. The fact that he had a prurient interest in the pictures he made was relevant to the jury's determination whether the pictures appealed to prurient interests generally. Production of the pictures was not a crime if they contained

"serious literary, artistic, political, or scientific value." *Miller,* 413 U.S. at 24; Code § 18.2-374.1(A)(3). Freeman's lascivious motivation in creating the sexually explicit material was also relevant to that element of the offense.

> [T]o aid a jury in the determination of whether the materials are obscene, the methods of their creation, promotion, or dissemination are relevant . . . . In essence, the Court has considered motivation relevant to the ultimate evaluation if the prosecution offers evidence of motivation.

Pinkus, 436 U.S. at 303. *See* Code § 18.2-384 (8)(c).

The trial court carefully limited the jury's consideration of the officer's testimony to the question of motivation, and we are of the opinion that the probative value of that testimony outweighed any potential prejudice.

B. *Expert Testimony*

Freeman questions admission of expert opinion testimony as proof the pictures were obscene for children.

As its expert witness, the Commonwealth called Dr. Merrill Runquist, a clinical psychologist, president of the Virginia Psychological Association, and a member of the University of Virginia faculty attached to the Division of Child and Family Psychiatry. As a practitioner, he sees adolescents and younger children for "diagnosis and psychotherapy". In the last two years, he had treated "a couple of hundred" children. "Sexual activity or sex interest are . . . behaviors [in] which psychology would have . . . interest," he explained, and "children . . . have sexual feelings and interests". Dr. Runquish was acquainted with psychiatric literature, which he described as "voluminous", on the subject of children's sexual interests.

Over Freeman's objection, Dr. Runquist testified as follows:

> Q. In your opinion, do those photographs appeal to the prurient interests of children as determined by the experience of children in the contemporary community?
>
> A. It is my opinion and my experience with children in this community it would so appeal to their prurient interests.
>
> Q. In your opinion . . . do these photographs lack literary, artistic, political and scientific value for children?
>
> A. They have no such value as far as I would judge.

An expert witness may express an opinion within his field of expertise but not as to an ultimate issue of fact within the province of the jury. *Cartera* v. *Commonwealth*, 219 Va. 516, 248 S.E.2d 784 (1978). Freeman believes that Dr. Runquist's opinions violate that rule.

We disagree. The ultimate issue of fact before the jury was whether the pictures were "obscene for children". Whether the pictures appealed to prurient interest and whether the pictures had any socially redeeming value were only two of the three sub-parts of the statutory test of material "obscene for children". Hence, considered individually or collectively, the expert's opinions did not invade the jury's right to resolve the ultimate issue of fact.

Even so, Freeman argues that the question whether the pictures had any socially redeeming value was not a matter within Dr. Runquist's field of expertise. We must agree. " '[T]he question of the qualification of a witness to speak as an expert lies largely in the discretion of the trial court, whose judgment will not be reversed unless it clearly ap-

pears that the witness was not qualified.' " *Jordan* v. *Commonwealth*, 207 Va. 591, 598, 151 S.E.2d 390, 395 (1966). While the record reveals that Dr. Runquist was eminently qualified to express an opinion on the question whether the pictures appealed to the prurient interest of children, there was no evidence to show that he had any expertise in the fields of literature, art, politics, or science. Accordingly, the trial court erred in admitting his opinion that the pictures had no redeeming social value for children. We next inquire whether the error was reversible or harmless.

Dr. Runquist was the only expert called at trial. But there is no "constitutional need for expert testimony . . . or for any other ancillary evidence of obscenity, once the allegedly obscene material itself is placed in evidence." *Kaplan* v. *California*, 413 U.S. 115, 121 (1973). *Accord*, *Paris Adult Theatre I* v. *Slaton*, 413 U.S. 49, 56 (1973) (materials "are the best evidence of what they represent"); *Ginzburg* v. *United States*, 383 U.S. 463, 465 (1966) (materials are "sufficient in themselves for the determination of the question").

> A juror is entitled to draw on his own knowledge of the views of the average person in the community or vicinage from which he comes for making the required determination, just as he is entitled to draw on his knowledge of the propensities of a 'reasonable' person in other areas of the law.

Hamling, 418 U.S. at 104-05.

These Supreme Court pronouncements were made in cases in which pornographic material was allegedly obscene by adult standards. Here, the jury was required to determine whether Freeman's pictures were "obscene for chil-

dren". We do not accept his thesis that an adult jury is unable to decide that question without benefit of expert advice. Many jurors are parents of children, most jurors are friends of children, and all jurors once were children themselves. We believe that jurors are qualified to judge a picture from a child's viewpoint and decide what effects it may have upon and whether it has any redeeming social value for the average member of the juvenile community.

We conclude that this jury, assessing the pictures they were shown and the evidence of lascivious motivation underlying their production, was fully justified in concluding that they were without socially redeeming value, and we hold that Dr. Runquist's opinion on that score was merely cumulative and that its admission was harmless error.

Finding no merit in Freeman's constitutional challenges and no reversible error in the evidentiary rulings he attacks, we will affirm the judgment.

Affirmed.

Office - Supreme Court, U.S.
FILED
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ALEXANDER L. STEVAS
CLERK

No. 81-55

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

THE PEOPLE OF THE STATE OF NEW YORK,

Petitioner,

—against—

PAUL IRA FERBER,

Respondent.

ON WRIT OF CERTIORARI TO THE NEW YORK STATE COURT OF APPEALS

BRIEF ON BEHALF OF AMERICAN BOOKSELLERS ASSOCIATION, INC., ASSOCIATION OF AMERICAN PUBLISHERS, INC., COUNCIL FOR PERIODICAL DISTRIBUTORS ASSOCIATIONS, FREEDOM TO READ FOUNDATION, INTERNATIONAL PERIODICAL DISTRIBUTORS ASSOCIATION, INC., NATIONAL ASSOCIATION OF COLLEGE STORES, INC., AMERICAN CIVIL LIBERTIES UNION, THE ASSOCIATION OF AMERICAN UNIVERSITY PRESSES, INC., NEW YORK CIVIL LIBERTIES UNION and ST. MARTIN'S PRESS, INCORPORATED AS *AMICI CURIAE*

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No. 81-55

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

THE PEOPLE OF THE STATE OF NEW YORK,

Petitioner,

—against—

PAUL IRA FERBER,

Respondent.

ON WRIT OF CERTIORARI TO THE NEW YORK STATE COURT OF APPEALS

BRIEF ON BEHALF OF AMERICAN BOOKSELLERS ASSOCIATION, INC., ASSOCIATION OF AMERICAN PUBLISHERS, INC., COUNCIL FOR PERIODICAL DISTRIBUTORS ASSOCIATIONS, FREEDOM TO READ FOUNDATION, INTERNATIONAL PERIODICAL DISTRIBUTORS ASSOCIATION, INC., NATIONAL ASSOCIATION OF COLLEGE STORES, INC., AMERICAN CIVIL LIBERTIES UNION, THE ASSOCIATION OF AMERICAN UNIVERSITY PRESSES, INC., NEW YORK CIVIL LIBERTIES UNION and ST. MARTIN'S PRESS, INCORPORATED AS *AMICI CURIAE*

The American Booksellers Association, Inc., Association of American Publishers, Inc., Council for Periodical Distributors Associations, Freedom to Read Foundation, International Periodical Distributors Association, Inc., National Association of College Stores, Inc., American Civil Liberties Union, The Association of American University Presses, Inc., New York Civil Liberties Union, and St. Martin's Press, Incorporated, (collectively referred to as "*Amici*") submit this brief *amici curiae* in support of respondent Paul Ira Ferber, pursuant to Rule 36.2 of the Rules of

this Court, urging affirmance of the decision below.[1] This joint brief is submitted upon the written consents of both petitioner and respondent.[2]

The *Amici*

American Booksellers Association, Inc. ("ABA") is a trade association composed of booksellers located throughout the United States. The Association has approximately 5,200 members consisting of private bookstores, university bookstores, and chain bookstores.

The Association of American Publishers, Inc. ("AAP") is the major national association for publishers of general and educational books in the United States. Its more than 300 members include large commercial book publishers and small or non-profit publishers, university presses and scholarly associations.

Council for Periodical Distributors Associations ("CPDA") is a national trade association for over 500 independent local wholesale distributors of magazines, comic books, paperback books, and newspapers.

The Freedom to Read Foundation, a non-profit organization supported by voluntary donations, was established in 1969 by the American Library Association to promote and defend First Amendment rights; to foster libraries as institutions wherein every citizen's First Amendment freedoms are fulfilled; to support the right of libraries to include in their collections and make available any work which they may legally acquire; and to set legal precedent for the freedom to read on behalf of all citizens.

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[1] The opinion of the New York Court of Appeals is reported at 52 N.Y.2d 674, 422 N.E.2d 523, 439 N.Y.S.2d 638 (1981).

[2] The written consents of petitioner and respondent to the filing of this brief are submitted herewith.

International Periodical Distributors Association, Inc. ("IPDA") is the trade association for the principal national periodical distributors engaged in the business of distributing or arranging for the distribution of paperback books and periodicals to wholesalers throughout the United States for ultimate distribution to retailers and the public.

National Association of College Stores, Inc. ("NACS") is a trade association composed of 2500 college and university bookstores located throughout the United States.

The American Civil Liberties Union ("ACLU") is a nationwide nonpartisan organization of over 200,000 members dedicated solely to preservation of the liberties safeguarded by the Bill of Rights. During its sixty-one year existence the ACLU has particularly been concerned with protecting the First Amendment guarantees of freedom of speech and press.

The Association of American University Presses, Inc. ("AAUP") is an educational not-for-profit association serving university presses. Its 78 members include the presses of virtually all of the most distinguished American universities, as well as several Canadian and international scholarly publishers.

The New York Civil Liberties Union ("NYCLU") is a not-for-profit corporation organized under the laws of New York State for the purpose of defending and promoting individual rights and liberties. It is the New York State branch of the American Civil Liberties Union and has over 20,000 members throughout the State. Freedom of speech and of the press have been principal concerns of the NYCLU since its inception.

St. Martin's Press, Incorporated, a member of the AAP, is a New York City publishing house. It is a subsidiary of Macmillan Publishers Limited, the 130 year old British

publisher. One of the many books it has published is *Show Me!*, a non-obscene, photographic sex education book containing explicit, sex-oriented photographs and designed primarily for use by parents in educating their children about some of the emotional and physical aspects of sex.

Interest of *Amici*

As representatives of writers, publishers and sellers of non-obscene books and periodicals distributed throughout the United States, as well as members of the public at large who purchase, borrow and read such materials, and the librarians who serve them, *Amici* have a vital interest in assuring that the freedoms guaranteed by the First Amendment to the United States Constitution are neither narrowed nor abridged. In the context of this case, *Amici* AAP, AAUP, ABA, CPDA, IPDA and NACS also seek to protect the rights of their members, many of whom could arguably be subjected to criminal liability pursuant to the statute under attack should the Court of Appeals decision be reversed. *Amicus* St. Martin's Press, Incorporated, is the publisher of a book, *Show Me!*, which could arguably subject it to criminal liability. Indeed, if the decision of the Court of Appeals is reversed, St. Martin's Press would again fear prosecution for the distribution and sale of *Show Me!* even though it has been found not to be obscene by three courts in three different states. *See St. Martin's Press, Inc.* v. *Carey*, 440 F. Supp. 1196, 1201-1202 (S.D. N.Y. 1977), *rev'd on other grounds*, 605 F.2d 41 (2d Cir. 1979).[3]

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[3] While librarians, with whom *amicus* Freedom to Read Foundation is closely associated, are granted an affirmative defense against prosecution under Section 263.20(2) of the New York statute, a number of other state statutes covering mere dissemination of non-obscene matter, cited in Petitioner's brief (page 13, n.4), do not

(Footnote continued on next page)

This case represents an effort by a state to carve out a novel, broad and unprecedented exception to the First Amendment. The question presented here is whether, in the interest of protecting youngsters from being exploited "as subjects in sexual performances", New York can proscribe the dissemination of a broad range of non-obscene, constitutionally protected materials.

The Statute

While the Court has often been confronted with attempts by state and local governments to impinge upon First Amendment freedoms, it has never, except in the most extraordinary circumstances, upheld a statute that makes it a crime to disseminate First Amendment protected materials based solely on the nature of their content. By enacting Section 263.15 (set forth in the Appendix) (the "Statute"), the State of New York has—purely and simply —attempted to engraft into First Amendment doctrine an unprecedented and wholly unjustified exception to well-recognized classes of protected speech. The State has conceded this, boldly asserting that, ". . . *regardless of whether materials which are devoted to depicting the sexual abuse of children fit into any previously recognized category of unprotected speech*, prohibiting dissemination of those materials does not violate the First Amendment if the 'compelling state interest-less restrictive alternative' standard is satisfied" (Brief for Petitioner, p. 16) (emphasis supplied).[4] The Court should reject the State's well-intentioned, but constitutionally-misguided, effort to undo

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provide such an exemption and would therefore appear to criminalize the normal professional activities of librarians. *See, e.g.*, Ariz. Rev. Stat. Ann. §13-3553; Hawaii Rev. Stat. §707-751; Ky. Rev. Stat. §§11-9-1.1; Tex. Penal Code Ann., Tit. 9, §43.25(e); Wis. Stat. Ann. §940.203(4).

[4] *See* discussion *infra* at Point B concerning the State's flawed "compelling state interest-less restrictive alternative" argument.

the unbroken line of precedent granting full constitutional protection to the speech here at issue—non-obscene depictions of naked children or of adolescent sexual behavior.

For the laudable purpose of protecting children from sexual exploitation, New York has not only made it illegal in §263.05 to use a child in a sexual performance[5] and in §263.10 to "manufacture, sell, disseminate or display" *obscene* materials which depict sexual conduct by youngsters under the age of 16,[6] but also, by its enactment of the Statute, has criminalized the dissemination, sale or display of constitutionally protected non-obscene materials which portray juveniles in sexually related roles.[7] While the proscriptions as they pertain to obscene works do not raise constitutional problems (*see Miller* v. *California*, 413 U.S. 15 (1974)), the prohibitions in the Statute banning the dissemination of First Amendment protected materials cannot be supported by any decision of the Court.

Under the Statute, it is a crime to participate in the public dissemination of any material which contains any depiction of actual or simulated sexual conduct by a child or "lewdly" exhibits the child's genitals.[8] No countervailing consideration is permitted for the artistic, literary, political or scientific merit of the work in which the photograph or other visual representation appears. According to the New York legislature, the dissemination of any material containing a depiction, actual or simulated, of juvenile sexual conduct is per se injurious to the well-being of the child, regardless of the context in which that con-

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[5] New York Penal Law, §263.05 (McKinney).

[6] New York Penal Law, §263.10 (McKinney).

[7] New York Penal Law, §263.15 (McKinney).

[8] New York Penal Law, §263.00 (McKinney).

duct is portrayed. Thus, adults in New York are deprived of their right to view or obtain, and publishers and booksellers are deprived of their right to disseminate, a broad variety of constitutionally protected materials.[9] *Cf. Butler* v. *Michigan*, 352 U.S. 380 (1957).

The Misconceptions Urged by Petitioner and Its Supporting Amici

Despite the broad claims of petitioner and its supporting *Amici* ("Petitioner's *Amici*") in briefs filed here in opposition to the Court of Appeals decision, the Statute is not a "child pornography" law. The task of proscribing child pornography is amply taken care of by other sections of the New York Penal Law, specifically §263.05 controlling the creation of such materials and §263.10 prohibiting the dissemination of related obscene works. To the contrary, the Statute reaches beyond the unprotected obscene materials prohibited by §263.10. It permits law enforcement officials to enter legitimate bookstores and libraries in order to seek out non-obscene works which arguably fall within the Statute's broad proscriptions of content.

As the U.S. Senate Judiciary Committee noted in considering a proposed federal child pornography bill that prohibited the dissemination of both obscene and non-obscene depictions of sexual conduct by children:

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[9] *E.g.* serious compilations of artistic photographs, such as Sullivan, *Nude Photographs, 1850-1980* (1980), pp. 47, 78, 125 and 134; Ruby, *The Human Figure: A Photographic Reference for Artists* (1974), pp. 309-317; Mason, *The Family of Children* (1977), pp. 84-85; Mark, *Prostitutes of Bombay* (1981); Hamilton, *Sisters* (1973); and the works cited in footnotes 22 and 27, *infra*. The overbreadth is compounded by the fact that the Statute defines "sexual conduct" to include "lewd exhibition of genitals" (New York Penal Law, §263.00-3). "Lewd" has not been defined by the legislature and can readily be interpreted to encompass a wide variety of genital exhibition.

"The Committee also believes that the enactment of such a provision would be unnecessary. It was the opinion of the experts who testified before the Committee that virtually all of the materials that are normally considered child pornography are obscene under the current standards. Thus, they can be prohibited under the existing federal obscenity statutes. Indeed as was noted earlier, federal authorities have already begun an extensive crackdown on child pornography." S. Rep. No. 95-438, 95th Cong., 2d Sess. 13, [1978] U.S. Code Cong. & Ad. News at 50.

Consequently, regardless of the nature of the motion pictures involved in this particular case (which, from their descriptions in the brief might well have been found obscene by a jury), it would be improper to view this appeal as one involving merely the adult entertainment districts of New York's larger cities where "child pornography" may be peddled, an activity that will continue to be prohibited by §263.10 even if the Statute is not resurrected. The focus, rather, should be on the overbroad impact of such statutes on legitimate publishers, booksellers, medical schools, and libraries, many of which stock, purchase and disseminate materials of serious artistic, literary, political or scientific merit that appear to fall within the ambit of the Statute. These works are not only fully entitled to First Amendment protection, but could not, by the remotest stretch of the imagination, be said to constitute "child pornography".

Potential Consequences Beyond the Scope of This Case

A reversal of the Court of Appeals decision will signal to the states that the Court sanctions direct invasions of First Amendment protections whenever a state can articulate

a reasonable sounding basis for doing so. Other new laws attempting to regulate a wide variety of speech are certain to follow, leading ultimately to a limiting redefinition of the scope of free expression through countless appeals to the Court. This burdensome process can easily be avoided. New York's interest in the well-being of its children is adequately protected by §263.05 prohibiting use of children in the creation of sexually related works and §263.10 which bans all child pornography.[16] An affirmance of the Court of Appeals decision holding the Statute unconstitutional will signal to the states that they may properly ban both the production and sale of child pornography, as well as sexual use and abuse of children, without regard to First Amendment considerations, but that they may not criminalize the dissemination of legitimate non-obscene works.

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[16] *See also* New York Penal Law, §260.10 (McKinney) (child abuse as a crime) and New York Soc. Serv. Law, Art. 6, Tit. I (care and protection of children, including abused children; see §371-4-b).

ARGUMENT

The Statute Violates the First Amendment to the United States Constitution.

The First Amendment, as interpreted by this Court, is intended to foster a wide open exchange of ideas and expression, free from state interference.

> "It is designed and intended to remove governmental restraints from the arena of public discussion, putting the decision as to what views shall be voiced largely into the hands of each of us, in the hope that use of such freedom will ultimately produce a more capable citizenry and more perfect polity and in the belief that no other approach would comport with the premise of individual dignity and choice upon which our political system rests." *Cohen* v. *California*, 403 U.S. 15, 24 (1971).[11]

Amici of course recognize that certain sexually explicit speech, if found obscene, is not protected First Amendment

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[11] Justice Holmes likened First Amendment protections to a free market for ideas, only allowing individual choice to determine what information is communicated.

> "[W]hen men have realized that time has upset many fighting faiths, they may come to believe even more than they believe the very foundations of their own conduct that the ultimate good desired is better reached by free trade in ideas,—that the best test of truth is the power of the thought to get itself accepted in the competition of the market; and that truth is the only ground upon which their wishes safely can be carried out. That, at any rate, is the theory of our Constitution." *Abrams* v. *United States*, 250 U.S. 616, 630 (1919) (Holmes, J., joined by Brandeis, J., dissenting).

In accord, *Thornhill* v. *Alabama*, 310 U.S. 88, 95 (1940) ("The safeguarding of these rights to speak as they think on matters vital to them and that falsehoods may be exposed through the processes of education and discussion is essential to a free government.")

expression. *Paris Adult Theatre I* v. *Slaton*, 413 U.S. 49 (1973). New York State, however, does not attempt to justify the Statute's proscriptions based upon an obscenity standard. Its justification, rather, is that in order to protect minors from commercial sexual exploitation, the dissemination of *all* materials containing certain sexually related depictions of children, even those with serious merit, must be banned.[17] Such a drastic measure is unprecedented, finds no support in the previous decisions of the Court, and goes much further than is required to alleviate the perceived harm. Accordingly the Statute, by imposing such overbroad restrictions, should be held unconstitutional as an infringement of First Amendment rights.[18]

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[17] As stated by the New York State legislature upon passage of New York Penal Law, §263.00 *et seq.*:

> "'The legislature finds that there has been a proliferation of exploitation of children as subjects in sexual performances. The care of children is a sacred trust and should not be abused by those who seek to profit through a commercial network based upon the exploitation of children. The public policy of the state demands the protection of children from exploitation through sexual performances.
>
> 'The legislature further finds that the sale of these movies, magazines and photographs depicting the sexual conduct of children to be so abhorrent to the fabric of our society that it urges law enforcement officers to aggressively seek out and prosecute both the peddlers of children and the promoters of this filth by vigorously applying the sanctions contained in this act.'" Legislative Findings and Declaration, New York Penal Law, §263.00 (McKinney).

[18] In fact, the only decisions known to *Amici* construing the constitutionality of statutes such as the one in issue in this case have found them unconstitutional. *St. Martin's Press* v. *Carey*, 440 F. Supp. 1196 (S.D.N.Y. 1977) *rev'd on other grounds* 605 F.2d 41 (2d Cir. 1979); *State* v. *Shingaki*, Hawaii Cir. Ct., 1st Cir., Cr. No. 54385, Apr. 27, 1981. *See also*, Pope, *Child Pornography: A New Role for the Obscenity Doctrine*, 1978 U. Ill. L. Forum 711, 743-44 ("New York's rejection of the obscenity doctrine [§263.15] appears patently unconstitutional.")

A. *Section 263.15 Does Not Fall Within Any of the Established Exceptions to the First Amendment*

In *Roth* v. *United States*, 354 U.S. 476 (1957), the Court noted the obvious: ". . . sex and obscenity are not synonymous" (at 487). For this reason, the Court recognized,

> "It is therefore vital that the standards for judging obscenity safeguard the protection of freedom of speech and press for material which does not treat sex in a manner appealing to prurient interest." *Id.* at 488.

The principle enunciated in *Roth*—that treatment of the subject of sex will be accorded constitutional protection unless the material in issue is found to be legally obscene—remains bedrock constitutional doctrine. Thus, in *Miller* v. *California*, *supra*, 413 U.S. at 29, the Court unequivocally announced: "[T]oday . . . a majority of this Court has agreed on concrete guidelines to isolate 'hard core' pornography from expression protected by the First Amendment." *Accord: Paris Adult Theatre I* v. *Slaton*, *supra*, 413 U.S. at 69 ("We have directed our holdings, not at thought or speech, but at depiction and description of specifically defined sexual conduct that States may regulate within limits designed to prevent infringement of First Amendment rights"); *Kaplan* v. *California*, 413 U.S. 115, 119-20 (1973) (pictures, films, printed words "have First Amendment protection until they collide with the long-settled position of this court that obscenity is not protected by the Constitution").

It is precisely because non-obscene sexual expression "taken as a whole" contains "serious literary, artistic, political or scientific value," *Miller* v. *California*, *supra*, 413 U.S. at 34, that such expression is entitled to First Amendment protection "regardless of whether the government or a

majority of the people approve of the ideas these works represent." *Id. See also Cohen* v. *California, supra,* 403 U.S. at 24-25 (unpleasant or offensive consequences of free expression constitute the "necessary side effects" of achieving "the broader enduring values" promoted by such expression).

In light of the foregoing, the New York Court of Appeals was entirely correct in finding overbroad the State's total prohibition of the dissemination of "non-obscene sexual performance involving children," 52 N.Y.2d at 678, and in recognizing that, "no matter what the government's objective, First Amendment standards remain applicable whenever the effect of a government regulation is to curtail protected modes of expression." 52 N.Y.2d at 679. This does not mean that a state may not curtail the use of children in the creation of child pornography. It is constitutionally free to do so, as New York has, by punishing those who employ or induce children to engage in proscribed forms of sexual conduct. To the extent a state wishes to curtail the publication or dissemination of materials depicting adolescent sexual activity by those having no relationship to the actual child abuse, it may also constitutionally do so, but only as § 263.10 provides, by punishing those who publish or disseminate legally obscene materials depicting such conduct.

Notwithstanding that the speech sought to be curbed by the Statute is non-obscene and hence entitled to constitutional protection, New York urges rejection of such "overly simplistic First Amendment analysis" (Brief for Petitioner, p. 7) in favor of the crafting of a massive constitutional loophole. This loophole, however, would enable the government to prohibit otherwise protected expression whenever it arguably promotes illegal activity. Thus, the State as-

serts, without benefit of any supporting authority: "Section 263.15 . . . is premised on the sound idea that the state can properly forbid distribution of materials produced in a certain manner if the state has properly prohibited that manner of production." Brief for Petitioner, p. 10. It is the State's contention that the ban on dissemination of non-obscene protected expression is constitutional solely because it furthers the State's interest in protecting children from child abuse. *Id.*

Amici have been unable to find a principled basis on which to justify the State's position; in fact, there is none. In considering the State's position, the Court must of course be guided by the recognition that exceptions to classes of speech entitled to First Amendment protection are few, "well-defined and narrowly limited." *Cohen* v. *California, supra,* 403 U.S. at 19-20; *Chaplinsky* v. *New Hampshire,* 315 U.S. 568, 571-72 (1942). *See also Hess* v. *Indiana,* 414 U.S. 105 (1973). The expression proscribed by the Statute fails to fall within the obscenity exception. Neither does that speech fall within any of the other established exceptions, *e.g.,* fighting words (*Chaplinsky* v. *New Hampshire, supra*), defamation (*see New York Times Co.* v. *Sullivan,* 376 U.S. 254 (1964)), or incitement to imminent lawless activity (*see Brandenburg* v. *Ohio,* 395 U.S. 444 (1969)). The State is thus asking the Court to adopt an entirely new exception to the First Amendment, unsupported by precedent. To accede to this request would require the Court to exclude from First Amendment protection all speech that has a tendency to make illegal activity more likely, since that is the only connection alleged by the State between the speech to be suppressed and a legitimate state purpose. Such an expansive new exception, however, is both unwise and unwarranted.

The required nexus between the speech sought to be censored and the illegal conduct said to be provoked thereby has previously been addressed by the Court. In *Brandenburg* v. *Ohio, supra,* 395 U.S. at 447 and *Hess* v. *Indiana, supra,* 414 U.S. at 108, the Court delineated the limited situations in which speech may be suppressed on the basis that it is likely to cause illegal conduct taking the form of street violence. According to the Court in *Brandenburg,*

> "the constitutional guarantees of free speech and free press do not permit a State to forbid or proscribe advocacy of the use of force or of law violation except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action." *Brandenburg* v. *Ohio, supra,* 395 U.S. at 447, quoted in *Hess* v. *Indiana, supra,* 415 U.S. at 108.

There is simply no compelling reason to dilute the *Brandenburg* test to accommodate the Statute. *Cf. Carey* v. *Population Services International,* 431 U.S. 678, 701 (1977). As discussed above, the cost of such a contraction of First Amendment rights is substantial. As the Court stated in *Cohen* v. *California, supra,* 403 U.S. at 24, "most situations where the State has a justifiable interest in regulating speech will fall within one or more of the various established exceptions." Surely, in an area of First Amendment doctrine as well-explored as the issue of the illegal conduct "caused" by speech, the fact that the Statute fails the established test as completely as it does demonstrates clearly its unconstitutionality.

B. *The Statute's Restriction on Speech Is Not Content Neutral; Nor Is It the Least Restrictive Alternative Available to Promote the State's Purpose*

The Statute, imposing restrictions on the content of First Amendment protected speech, is unconstitutional, especially since there are less restrictive alternatives available. Although the State relies heavily upon this Court's decision in *United States* v. *O'Brien*, 391 U.S. 367 (1968),[14] to support the Statute, such reliance is misplaced.

O'Brien involved the prosecution of a demonstrator for burning his draft card in public to protest against the Vietnam War. He was tried under the 1965 Amendment to §12(b)(3) of the Universal Military Training and Service Act (50 U.S.C. App. §462(b)(3)), which makes it a crime "knowingly" to destroy or mutilate a selective service registration certificate. O'Brien argued that the statute violated the First Amendment by effectively denying to him his right to express disapproval of the war by the act of burning his card.

Finding the statute constitutional, the Court set out the test to be applied when a law regulating conduct is challenged as violative of the First Amendment:

> "[A] governmental regulation is justified . . . [1] if it furthers an important or substantial government interest; [2] if the governmental interest is unrelated to the suppression of free expression; and [3] if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest." *Id.*, at 377.

Here the Statute regulates the conduct of *Amici* and others similarly situated by proscribing the dissemination

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[14] *See* Brief for Petitioner, p. 11.

of certain constitutionally protected works. Assuming, arguendo, that such a prohibition is rationally related to the furtherance of a legitimate concern of the State of New York (at least to the extent that the minors protected are residents of the State of New York) and thus complies with the first of the criteria,[15] it nonetheless fails to meet the other two.

The harm allegedly protected against is not, as required by the second part of *O'Brien*, unrelated to the suppression of First Amendment rights.[16] The Statute is directed only at materials which portray certain juvenile sexual activities. Consequently, it is the harm perceived to be caused by the message itself which has led to criminalization of the works covered by the Statute.

In similar contexts, the Court has not sanctioned indiscriminate direct invasions of First Amendment freedoms. When students were suspended from school for wearing armbands in protest of the Vietnam War, their suspensions were overturned. The Court's decision emphasized that the suspensions were invalid because they were made pursuant to a regulation which banned only the specific form of expression chosen by the students.

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[15] *Amici* do not deny that §263.05, barring the actual "use" of children, furthers the legitimate and important state interest in protecting children from sexual child abuse. The relation, however, between the dissemination offenses and the desire to prevent child abuse is, of course, far more tenuous. Section 263.10, dealing with "obscene" matter, is presumptively constitutional under *Miller* v. *California*, *supra*, whether or not it otherwise furthers the State's interest in child protection. The Statute, on the other hand, is far removed both from the actual criminal abuse and from the dissemination of materials without constitutional protection. Therefore, in *Amici's* view, it raises far more difficult questions, even under the first branch of the *O'Brien* test. In this respect the burden is on the State. *Elrod* v. *Burns*, 427 U.S. 347, 362 (1976).

[16] See, for example, note 12, *supra*, wherein the State interest, as expressed by the New York legislature, is set forth.

Tinker v. *Des Moines Independent Community School District*, 393 U.S. 503 (1969).

In another case, when a protestor was convicted of disturbing the peace merely for wearing a jacket containing a disquieting epithet directed toward the military draft, the Court once again found that the state action was unconstitutional. California, by its prosecution of the protestor, unconstitutionally intended to shield the public from the form of the communication chosen. *Cohen* v. *California, supra.*

Only where the regulation of conduct is "content neutral" (*see United States* v. *O'Brien, supra* and *Prince* v. *Massachusetts*, 321 U.S. 158 (1944)[17]) or where the restriction on expression is "minimal" (*Young* v. *American Mini Theatres Inc.*, 427 U.S. 50 (1976); *Schad* v. *Borough of Mount Ephraim*, —— U.S. ——, 101 S.Ct. 2176 (1981)) has the Court tolerated the concomitant abridgement of First Amendment protections.

The Statute is not "content neutral". It is aimed only at certain sexually related speech and ignores other communications or expressions which may similarly cause injury to young juveniles. *See People* v. *Ferber*, 52 N.Y.2d at 680-81. By singling out only works depicting certain conduct, the Statute is patently unconstitutional. *Cf. Tinker, supra*, 393 U.S. at 510-11; and *Erznoznik* v. *City of Jacksonville*, 422 U.S. 205, 214 (1975). Nor is the restriction minimal; it is, in fact, absolute.

Even if the Court were to find the Statute "content neutral," it still must fall under the third criterion of

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[17] See also, Ely, *Flag Desecration: A Case Study in the Roles of Categorization and Balancing in First Amendment Analysis*, 88 Harv. L. Rev. 1482, 1496-1502 (1975).

O'Brien in that it restricts First Amendment freedoms to a greater extent than is necessary.

As evidenced by the legislative policy statement issued upon passage of the Statute,[18] New York is primarily concerned with eliminating the sexual exploitation of persons under age 16. This result is still achieved if the Statute is declared unconstitutional in that separate provisions in the New York Penal Law already proscribe the creation as well as dissemination of child pornography.[19] Section 263.05 makes the use of children in the creation of child pornography illegal while §263.10 bans its dissemination. These are sufficient to not only effectuate the state policy of protecting youths from sexual exploitation, but, as a less restrictive alternative, also avoid any infringement of First Amendment freedoms by not also criminalizing non-obscene works. See *Schad* v. *Borough of Mount Ephraim, supra,* 101 S. Ct. at 2183.

C. *New York's Interest in Protecting the Welfare of Children Living Within the State Does Not Justify the Denial of First Amendment Rights*

Petitioner claims that New York's interest in the protection of its children is sufficiently compelling so that constitutional rights to publish, distribute and sell certain non-obscene materials can be restricted. The State urges that it is "physically, psychologically and emotionally harmful" for a child to be depicted engaging in various categories of sexually related conduct in any work, regardless of its legitimate value.[20]

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[18] See note 12, *supra.*

[19] New York Penal Law §§263.05 and 263.10 (McKinney). *See also* the statutes regulating child abuse cited in fn. 10, *supra.*

[20] See Brief for Petitioner, pp. 14-15.

This very argument, that a state's interest in protecting the reputation and emotional well-being of its youths outweighs First Amendment freedoms, has previously been made to, and rejected by, the Court. In *Smith* v. *Daily Mail Publishing Co.*, 443 U.S. 97 (1979), a newspaper printed the name of a juvenile offender in violation of a West Virginia law which prohibited such a publication absent the prior written approval of the Juvenile Court. The State urged that the law was a constitutional attempt to protect the welfare of West Virginia youths who become enmeshed in the criminal process at a young age.[21] Chief Justice Burger, writing for seven of the eight justices who heard the case, rejected the argument that such an interest could outweigh First Amendment rights.

> ". . . [T]he reasoning of Davis [v. Alaska, 415 U.S. 308 (1974)] that the constitutional right must prevail over the state's interest in protecting juveniles applies with equal force here.
>
> "The magnitude of the State's interest in this statute is not sufficient to justify application of a criminal penalty to respondents." *Id.* at 104.

Similarly, in *Cox Broadcasting Corp.* v. *Cohn*, 420 U.S. 469 (1975), the Court denied enforcement of a Georgia statute which, in effect, deprived the media of its right to publish or broadcast the name of a rape victim in order to protect her family's right of privacy.

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[21] The state interest is described in the Court's opinion as follows:

"The sole interest advanced by the State to justify its criminal statute is to protect the anonymity of the juvenile offender. It is asserted that confidentiality will further his rehabilitation because publication of the name may encourage further antisocial conduct and also may cause the juvenile to lose future employment or suffer other consequences for this single offense." *Smith* v. *Daily Mail Publishing Co.*, *supra*, 443 U.S. at 104.

Here, like *Smith* and *Cox*, the enunciated state interest cannot prevail over the First Amendment rights of *Amici* and others to disseminate legitimate works which contain non-obscene depictions of juvenile sexual conduct.

D. *The Amended Statute, by Failing to Provide an Exemption for Medical, Scientific or Educational Material, Is Overly Broad and Unconstitutional*

An absolute prohibition of the dissemination of all works which depict children engaged in certain categories of sexually related conduct, regardless of obscenity, clearly regulates protected speech. The State so concedes in its brief. (Brief for Petitioner, p. 26.) If the Statute is upheld, *Amici's* publisher, distributor, and bookseller members will be denied their right to disseminate a wide range of medical, scientific and educational works which, as an essential part of their content, contain sexually related pictures of naked youths.[22]

This Court has repeatedly stressed that laws are overbroad and unconstitutional when they restrict First Amendment freedoms in the process of regulating unprotected expression.

> "A . . . threat is inherent in a penal statute, like that in question here, which does not aim specifically at evils

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[22] *See, e.g.*, Falkner, *Human Development* (1966), pp. 184-221 (This text is geared toward educating physicians, scientists and students studying anatomy, genetics, biochemistry, physiology, psychology and behavioral science and in furtherance thereof, contains explicit photographs of minors displaying various genital deformities); Waldo, *Textbook of Pediatrics* (1979), pp. 1567-1570, 1623-1630 (Basic pediatric text dealing with diagnosis and treatment); Rudolph, *Pediatrics* (16th Ed. 1977), pp. 1328, 1608, 1678, 1713-14, 2015 (Pediatrician's desk book for diagnosis and treatment); Forfar and Arniel, *Textbook of Paediatrics* (1973), pp. 1052-55, 1115 (Pediatrician's desk book for diagnosis and treatment); and Lightwood, Brimblecombe and Barltrop, *Paterson's Sick Children* (9th Ed. 1971), pp. 203, 206, 208 (Text dealing with diagnosis of children's diseases).

> within the allowable area of State control but, on the contrary, sweeps within its ambit other activities that in ordinary circumstances constitute an exercise of freedom of speech or of the press. The existence of such a statute, which readily lends itself to harsh and discriminatory enforcement by local prosecuting officials, against particular groups deemed to merit their displeasure, results in a continuous and pervasive restraint on all freedom of discussion that might reasonably be regarded as within its purview." *Thornhill* v. *State of Alabama*, 310 U.S. 88, 97-98 (1940).[23]

Furthermore, the Court is not constrained by the facts of this case in determining the constitutionality of the Statute.[24] When a law is attacked on overbreadth grounds, the Court must look beyond the record to other unrelated potentially improper applications of the regulation at issue:

> "[T]he instant decree may be invalid if it prohibits privileged exercises of First Amendment rights whether or not the record discloses that the petitioner

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[23] See also *Erznoznik* v. *City of Jacksonville*, *supra*, 422 U.S. at 216 ("This Court has long recognized that a demonstrably overbroad statute or ordinance may deter the legitimate exercise of First Amendment rights."); and *Dombrowski* v. *Pfister*, 380 U.S. 479, 486 (1965).

[24] While it is true that Ferber was convicted under the Statute and acquitted under §263.10, it is likely that the jury's unwillingness to impose a double penalty, and not the nature of the seized films' contents, was the reason for such action. Due to their similar wording, a defendant cannot be convicted under §263.10 without also being found guilty under the Statute because all "obscene" sexual performances violate both provisions. Had only §263.10 been on the books, it is likely that Ferber would have been convicted under that statute. (See Brief of *Amici* Keating and Citizens for Decency Through Law, pp. 30-31) Consequently, the nature of the films which formed the basis for Ferber's conviction should not be regarded as illustrative of the kinds of works proscribed by the Statute.

has engaged in privileged conduct. For in appraising a statute's inhibitory effect upon such rights, this Court has not hesitated to take into account possible applications of the statute in other factual contexts besides that at bar." *N.A.A.C.P.* v. *Button*, 371 U.S. 415, 432 (1963)

As noted, the State readily admits that protected expression is proscribed by the Statute, but proposes that such overbreadth be ignored here and dealt with on a case-by-case basis in later criminal prosecutions.[25] The Court has previously considered and emphatically rejected similar proposals.

"When the statutes also have an overbroad sweep, as is here alleged, the hazard of loss or substantial impairment of those precious rights may be critical. For in such cases, the statutes lend themselves too readily to denial of those rights. The assumption that defense of a criminal prosecution will generally assure ample vindication of constitutional rights is unfounded in such cases. See Baggett v. Bullitt, supra, 377 U.S. at 379. For '[t]he threat of sanctions may deter . . . almost as potently as the actual application of sanctions . . .' N.A.A.C.P. v. Button, 371 U.S. 415, 433." *Dombrowski* v. *Pfister, supra,* 380 U.S. at 486.

Cf. Gooding v. *Wilson*, 405 U.S. 518, 520-21 (1972).

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[25] See Brief for Petitioner, p. 26:

"To take an instance cited by the court below (App. A. at 5a) in the unlikely event that a person would ever be prosecuted for showing 'a filmed report of New Guinea fertility rites,' that person could interpose a defense based on the unconstitutionality of the statute as applied. Given the legitimate breadth of the statute, these limited situations can be dealt with on a case by case basis, without resort to the drastic remedy of declaring the statute unconstitutional on its face."

These are not hypothetical concerns. *Amici's* members, publishers and distributors of legitimate materials, face the real threat of criminal prosecution pursuant to the Statute's overbroad prohibitions. Apart from actual prosecution, the "chilling effect" of such an overbroad statute is equally real. The New York legislature's failure to include an exemption for medical, scientific and educational works, as well as the coexistence of §§263.10 and 263.15, is conclusive of its intent to regulate, by the Statute, both protected and unprotected expression. In light of this obvious overbroad legislative intent, recognized by the Court of Appeals below, the Statute cannot be construed narrowly. *Cf. Prince* v. *Massachusetts, supra,* 321 U.S. at 163. The Court should, therefore, find the Statute unconstitutional on its face and permanently enjoin the State from its enforcement.

E. *By Allowing the Moral Values of Some to Dictate What May Be Read by All, the Statute Impermissibly Infringes Upon the Rights of Parents and Teachers to Educate Children About Sex With the Aid of Materials Designed to Deal With the Subject in a Frank and Non-Obscene Manner*

Among our most sacred freedoms are those protected by the First Amendment to the United States Constitution. *N.A.A.C.P.* v. *Button, supra.* They ensure that no person or group will ever be able to set out the subjects about which we can read, think or teach. *Cf. Cohen* v. *California, supra.* The State and Petitioner's *Amici,* however, seek to impose their view of morality upon the State of New York by banning the protected works covered by the Statute. The Court in *Near* v. *Minnesota,* 283 U.S. 697 (1931) rejected a similar attempt to restrict the scope of First Amendment freedoms:

"'If the township may prevent the circulation of a newspaper for no reason other than that some of its inhabitants may violently disagree with it, and resent its circulation by resorting to physical violence, there is no limit to what may be prohibited.' The danger of violent reactions becomes greater with effective organization of defiant groups resisting exposure, and if this consideration warranted legislative interference with the initial freedom of publication, the Constitutional protection would be reduced to a mere form of words." *Id.* at 722.

A focal point of the briefs of Petitioner and Petitioner's *Amici* is the emphasis placed upon calling all photographs of young juveniles engaged in certain conduct "child pornography". In the context of the Statute, which proscribes non-obscene works, use of such a term is erroneous and misleading. "Pornography" is defined as "obscene or licentious writing, painting, or the like".[26] Where, however, children are depicted in materials which *have* serious scientific, literary, political or artistic merit, those works are not, by definition, obscene. They should not be categorized as "child pornography."

Within this group of materials, the dissemination of which is criminalized by the Statute, are pictorial texts intended to aid parents and teachers in educating children about anatomy, sex and sexual relationships.[27] The authors

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[26] *Webster's New International Dictionary* (2d Ed. 1957), Unabridged, p. 1922; See also, Black, *Black's Law Dictionary, 5th Ed.*, West Publ. Co., 1979, p. 1075.

[27] See, Waxman, *Growing Up Feeling Good; A Child's Introduction to Sexuality* (1979) (Teaches human sexuality to children by discussing love, love making and genital development. Using pictures to supplement the written material); Waxman, *What is a Girl? What is a Boy?* (1976) (Very basic pictorial essay

(Footnote continued on next page)

of these works uniformly believe that there is a psychological benefit to being exposed to such materials at a young age. It is thought that by seeing pictorial presentations of sex in an open and unembarrassed manner, youths will not need to learn about relationships, birth control and pregnancy on street corners, and, further, can more easily develop into mature, aware adults.

The *President's Commission on Obscenity & Pornography* ("President's Commission") came to a similar conclusion in its 1970 report where it stated:

> "Biological studies indicate that boys and girls enter pubescence earlier than formerly was the case, and, as a result, are aware of their sexual feelings earlier. It is highly desirable at this stage in their development that they receive straightforward information from their parents, from the school, and from qualified community agencies. . .
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> • • •
>
> "A study by Offer (1969) defines the levels of sexual development that young people in high school and college experience, and suggests that as interest in the opposite sex begins to crystallize, attitudes are more important initially than overt sexual behavior. These developing attitudes must be based on accurate and complete information regarding sexuality if subsequent behavior is to be responsible and mature.

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of anatomy geared toward children. Designed to teach the differences between males and females.); Goldstein, Haeberle and McBride, *The Sex Book, A Modern Pictorial Encyclopedia* (1971) (Pictorial encyclopedia of anatomy and sexuality with accompanying text.); McBride and Fleischhauer-Hardt, *Show Me!* (1975) (A picture book of anatomy and sexual relationships for parents and children.); and Nass, Libby & Fisher, *Sexual Choices* (1981) (Text book for college classes studying human sexuality which includes photographs of naked children as an aid to understanding the textual material).

> "Sex education, then, must be expanded and more fully developed as an integral element of general health education to insure its adequacy to meet the needs of the whole community. *Both parents and young people require adequate sources of reliable information, and the community should provide these sources through its trained personnel and institutions.*" Report, Bantam Books Edition, pp. 312-13. (emphasis added)

Included in such works, of necessity, are depictions of persons under the age of 16 so that the youngsters reading these books can fully understand their own sexual development from childhood to puberty through adulthood. While all Americans may not agree that non-obscene pictorially honest renditions of anatomy and sexual relationships are the best way to educate children about human sexuality, it would be contrary to our Constitutional freedoms to deny those parents who choose to have their children taught with such materials their right to do so. *See Ginsberg* v. *New York*, 390 U.S. 629 (1968).[18] The statute, however, would deny parents this choice. As stated by the Court in *Cohen* v. *California, supra*, 403 U.S. at 21, those individuals who are offended by such texts can avoid exposure to them "simply by averting their eyes."

By permitting books to be banned in the manner contemplated by the Statute, the Court would be impliedly saying to children that sex is a subject which can be dis-

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[18] In *Ginsberg*, the Court stated:

"First of all, constitutional interpretation has consistently recognized that the parents' claim to authority in their own household to direct the rearing of their children is basic in the structure of our society. 'It is cardinal with us that the custody, care and nurture of the child reside first in the parents, whose primary function and freedom include preparation for obligations the state can neither supply nor hinder.' Prince v. Massachusetts, supra at 166." *Id.* at 639.

cussed openly only in back alleys and on street corners. It is this attitude that the President's Commission concluded must be eliminated if our society is to ever outgrow its preoccupation with pornography:

> "Sex education, *straightforward and adequate begun in the home,* continued in school, and supplemented by community agencies such as religious, medical and other service institutions, can reduce interest in pornography as a source of information and can assist in developing a healthy attitude toward sexuality." Report, p. 312. (emphasis added)

The Court must not allow the moral values of some to be thrust upon all. Individual choice is the cornerstone of a free society. The Statute, as a proscriptive law aimed at eliminating only certain forms of protected speech, should be held unconstitutional as denying New Yorkers of their right to free expression.

F. *The Statute Cannot Be Saved by Analogies to So-Called "Trafficking" and "Contraband" Laws Which Require the Existence of an Underlying Crime and That the Speaker Be Directly Involved in That Criminal Activity*

Amicus curiae Covenant House, in its brief (pp. 19-22), attempts to support the constitutionality of the Statute by analogy to the so-called "trafficking" and "contraband" laws, i.e., federal criminal statutes which ban certain transmissions and communications involving, or made with the knowledge of, various underlying crimes. The "trafficking" statutes referred to by Covenant House relate to the transmission of wagering information (18 U.S.C. §1054) and the promotion of racketeering activities (18 U.S.C. §1952); the contraband statutes referred to prohibit the disclosure of information obtained through illegal wiretapping (18 U.S.C.

§2511(1)(c)) and the sale of products manufactured with oppressive child labor (29 U.S.C. §212(a)).[29] These analogies, however, fall wide of the mark for two important reasons.

First, the Statute, as recognized by the Court of Appeals below, bars the dissemination of works even if they contain pictures taken outside New York "in another State or country where such conduct may not be prohibited." *People* v. *Ferber*, 52 N.Y.2d at 680.[30] Petitioner and Covenant House support this interpretation.[31] Thus, since the photographs may have been taken where their production did not violate any law, there is not necessarily an underlying crime, as is required in all the "trafficking" and "contraband" statutes cited by Covenant House.

In addition, due to its multi-jurisdictional application, the Statute can subject a seller to criminal liability for disseminating works which contain photographs that he reasonably believes were legally taken outside New York State or outside the country since knowledge is not an element of the crime.

Petitioner and Covenant House also assert that the Statute is no different in principle than the prohibition of the products manufactured with child labor in violation of 29

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[29] Petitioner also makes a similar argument concerning the child labor laws at pages 17-18 of its brief.

[30] In *St. Martin's Press, Inc.* v. *Carey*, 605 F.2d 41, 44 (2d Cir. 1979) the majority opinion suggested that the New York courts would interpret the Statute not to include films or photographs produced outside the United States. This interpretation, however, was squarely rejected by the New York Court of Appeals in the decision below. In fact, at the trial of this case, the Respondent himself attempted to prove that the films in question were taken and produced in Europe, but his offer of proof was disallowed as irrelevant.

[31] See, Brief for Petitioner, pp. 29-32; and Brief of Covenant House, pp. 23-25.

U.S.C. §212. The child labor laws, however, unlike the Statute, clearly do not infringe upon protected speech. *Protection of Children from Use in Pornography: Toward Constitutional and Enforceable Litigation*, 12 Mich. L.J. Reform 295, 316 n.127 (1979). It is one thing to say that children cannot be hired to produce a newspaper. It is quite another thing to argue that it cannot be sold because it contains photographs of child labor.

This distinction was recognized by the Court in *Oklahoma Press Publishing Co.* v. *Walling*, 327 U.S. 186 (1946) where it stated:

> "The broadside assertion that petitioners 'could not be covered by the [Fair Labor Standards] Act,' for the reason that 'application of this Act to its newspaper publishing business would violate its rights as guaranteed by the First Amendment,' is without merit. If Congress can remove obstructions to commerce by requiring publishers to bargain collectively with employees and refrain from interfering with their rights of self-organization, matters closely related to eliminating low wages and long hours, Congress likewise may strike directly at those evils when they adversely affect commerce. *The Amendment does not forbid this or other regulation which ends in no restraint upon expression or in any other evil outlawed by its terms and purposes.*" 327 U.S. at 192-193 (citations omitted; emphasis added)[22]

Second, the federal laws cited by petitioner and Covenant House banning certain communications require not only the

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[22] The Court added in a footnote to the above statement in *Oklahoma Press Publishing Co.*, that "[n]o question is presented whether Congress could enforce its mandate by excluding from commerce the circulation of a publisher refusing to conform." 327 U.S. at 193 n.8.

existence of an underlying crime, but also, contrary to the assertion of Covenant House,[33] the person doing the communicating be involved with, or have knowledge of, the underlying crime. The Statute, to the contrary, subjects a seller to liability even though he may have had nothing to do with the original production of the picture and knows nothing about it.

For this reason, neither newspapers which merely convey information regarding illegal activities nor gambling "tip sheets" are proscribed by either §1084 or §1952. 18 U.S.C. §1084(b); *U.S.* v. *Alpirn*, 307 F.Supp. 452 (S.D.N.Y. 1969); *Kelly* v. *Illinois Bell Telephone Co.*, 210 F.Supp. 456 (N.D. Ill. 1962), *aff'd*, 325 F.2d 148 (7th Cir. 1963). Indeed, it has been held that if statutes such as these did apply to a "speaker" not involved with the underlying crime, they would be in violation of the First Amendment. *Kelly* v. *Illinois Bell Telephone Co., supra* at 465.

In contrast, the Statute does not require any involvement by the disseminator in the actual photographing of a child or any knowledge by him that the photograph was taken in violation of law. The dissemination of a work can be in violation of the Statute even though its production was not in violation of §263.05, and, indeed, even if such production was not a crime of any kind.

It is apparent, therefore, that the analogies drawn by Petitioner and Covenant House to interstate communications and distribution proscriptions where they relate to criminal activities are without merit.

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[33] See Brief of Covenant House, p. 20.

CONCLUSION

For the reasons set forth above, the Statute is unconstitutional, and therefore the decision of the Court of Appeals should be affirmed.

Respectfully submitted,

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APPENDIX

Relevant Statutory Provisions

§263.00 *Definitions*

As used in this article the following definitions shall apply:

1. "Sexual performance" means any performance or part thereof which includes sexual conduct by a child less than sixteen years of age.

2. "Obscene sexual performance" means any performance which includes sexual conduct by a child less than sixteen years of age in any material which is obscene, as such term is defined in section 235.00 of this chapter.

3. "Sexual conduct" means actual or simulated sexual intercourse, deviate sexual intercourse, sexual bestiality, masturbation, sado-masochistic abuse, or lewd exhibition of the genitals.

4. "Performance" means any play, motion picture, photograph or dance. Performance also means any other visual representation exhibited before an audience.

5. "Promote" means to procure, manufacture, issue, sell, give, provide, lend, mail, deliver, transfer, transmute, publish, distribute, circulate, disseminate, present, exhibit or advertise, or to offer or agree to do the same.

6. "Simulated" means the explicit depiction of any of the conduct set forth in subdivision three of this section which creates the appearance of such conduct and

which exhibits any uncovered portion of the breasts, genitals or buttocks.

7. "Deviate sexual intercourse" means the conduct defined by subdivision two of section 130.00 of this chapter.

8. "Sado-masochistic abuse" means the conduct defined in subdivision five of section 235.20 of this chapter.

§263.05 *Use of a child in a sexual performance*

A person is guilty of the use of a child in a sexual performance if knowing the character and content thereof he employs, authorizes or induces a child less than sixteen years of age to engage in a sexual performance or being a parent, legal guardian or custodian of such child, he consents to the participation by such child in a sexual performance.

Use of a child in a sexual performance is a class C felony.

§263.10 *Promoting an obscene sexual performance by a child*

A person is guilty of promoting an obscene sexual performance by a child when, knowing the character and content thereof, he produces, directs or promotes any obscene performance which includes sexual conduct by a child less than sixteen years of age.

Promoting an obscene sexual performance by a child is a class D felony.

§263.15 *Promoting a sexual performance by a child*

A person is guilty of promoting a sexual performance by a child when, knowing the character and content thereof,

he produces, directs or promotes any performance which includes sexual conduct by a child less than sixteen years of age.

Promoting a sexual performance by a child is a class D felony.

MOTION FILED
JAN 18 1982

No. 81-55

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

THE PEOPLE OF THE STATE OF NEW YORK,

Petitioner,

—against—

PAUL IRA FERBER,

Respondent.

ON WRIT OF CERTIORARI TO THE
NEW YORK STATE COURT OF APPEALS

MOTION FOR LEAVE TO FILE A BRIEF *AMICUS CURIAE* AND *AMICUS CURIAE* BRIEF

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NEW YORK STATE COURT OF APPEALS

MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE* AND BRIEF *AMICUS CURIAE*

Covenant House hereby respectfully moves for leave to file the attached brief *amicus curiae* in support of The People of the State of New York in this case. The consent of the attorney for the petitioner has been obtained. The consent of the attorney for the respondent was requested but no response was received.

Interest of Covenant House

Covenant House is a New York not-for-profit corporation. Its principal activity has always been child care, first in group homes providing long-term care to small groups of homeless children, then, beginning in 1977, extending temporary shelter, care and counselling to thousands of runaway or destitute children annually (7,360 new cases in 1980

alone). Covenant House's Under 21 crisis shelter, located in the Times Square area of Manhattan, includes a fully staffed medical clinic, a public school, a battery of professional social workers, a large child-care staff, a cafeteria serving three meals a day, and accommodations for approximately 200 children per night.

The location of the Under 21 center and its no-strings open-intake policy have brought Covenant House into constant confrontation with the sex industry that dominates the Times Square landscape and feeds upon the desperation of the young people attracted there. The majority of the children housed at Under 21 have been sexually exploited at least in the sense of having been forced to trade sex for food or shelter. A significant minority has been used in the production of child pornography. As Covenant House is one of a tiny number of organizations with significant experience in caring for sexually exploited children, it has the obligation to represent the interests of those children before this Court in a case as critical as this for their future.

Importance of Case for Sexually Exploited Children

Because this case arose as a criminal action, its issues have been largely framed as a clash between the power of the state and the purported First Amendment rights of the respondent. Left out of the analysis—because of the incapacity of the parties and the court below to understand the scope of the problem—has been a serious consideration of the interests of the victims of the "kiddie porn" industry.

As outlined in the attached brief, those interests are not tangential to this case—they are fundamental. The distribution of child pornography not only seriously extends and deepens the injuries to children from the production of

such material, but it causes, too, harms completely distinct from the original sexual exploitation. New York was fully justified, based on the privacy interest of the children involved, in prohibiting the distribution of certain specifically defined varieties of child pornography.

Covenant House in its attached brief brings to this case a consideration of this central privacy issue, and attempts in factually oriented appendices to outline the wealth of material bearing on the subject of sexual exploitation of children. Analysis is included, as well, of the criminal nature of distributing "kiddie porn" on the basis of the illegality of its production under state and federal law. The interface of the First Amendment with the special characteristics of photographic "speech" is the final topic considered.

Once before, in September, 1981, Covenant House requested leave of this Court to file a brief *amicus curiae* in this case in support of New York's petition for a writ of certiorari. On November 16, 1981, the Court granted that motion and, far more importantly, granted the writ of certiorari. Covenant House in its new brief has attempted to explore in greater depth the arguments which it was able only to outline in its earlier brief. Again Covenant House believes it may have something of value to contribute to this troubled controversy, but this motion is of only minor moment compared with the lives and the principles at stake in this case. Above all, therefore, Covenant House respectfully begs the Court to weigh those interests carefully and, ultimately, to reverse the decision of the New York Court of Appeals.

Respectfully submitted,

Edmund J. Burns
Attorney for Covenant House
Movant-Amicus Curiae

Questions Presented

1. Can a state act to protect the privacy of children who are being exhibited in specifically defined, graphic sexual activity by banning the distribution of material containing such exhibitions of children?

2. Does the State's interest in suppressing the criminal conduct of using children in specifically defined, graphic sexual performances justify the prohibition of promoting such performances, where such promotion extends and deepens the harms of the underlying crime?

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No. 81-55

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

THE PEOPLE OF THE STATE OF NEW YORK,

Petitioner,

—against—

PAUL IRA FERBER,

Respondent.

ON WRIT OF CERTIORARI TO THE
NEW YORK STATE COURT OF APPEALS

BRIEF *AMICUS CURIAE*

Statement of Interest

As more fully explained in the accompanying motion, Covenant House is a non-profit organization dedicated to the shelter and care of destitute children. Most of the thousands of children in its care each year have been sexually exploited, many have been involved in pornography. Covenant House is before the Court as amicus curiae representing the victims of the "kiddie porn" industry.

Summary of Argument

The distribution or exhibition of material depicting children engaged in such graphic sexual activity as masturbation, normal or deviate sexual intercourse, sado-masochistic abuse or bestiality causes severe harms to the children in-

volved. Those harms are distinct from the damage to "kiddie porn" performers in the production of the material—and at least as serious. New York, in Penal Law § 263.15,* prohibited the promotion of specifically defined sexual performances by children in order to serve two vital state interests: (1) protection of the privacy of the children induced to participate in such performances; and (2) suppression of conduct that compounds the original crime of producing child pornography by inflicting the further harms involved with its distribution.

New York's assault on the sexual exploitation of children in no way dilutes First Amendment guarantees of free expression. Those guarantees do not permit the nonconsensual invasion of children's privacy through public display of their most intimate conduct. Nor does the First Amendment prevent the proscription of speech in furtherance of an illegal activity—here the federal and state crimes of producing child pornography. The harms from promoting even technically "non-obscene" child pornography far outweigh any political, social or intellectual benefit from such activity. Because children's sexual performances cannot be consensual in any meaningful sense, their exhibition involves none of the traditional rationale for protecting individual self-expression. Prohibition of explicit "kiddie porn" amounts to no more than a reasonable regulation of the manner in which film makers and distributors may exercise their First Amendment rights.

The majority decision below, overruling the trial and lower courts and invalidating New York Penal Law § 263.15, failed to consider the special harms to children incident to distribution of sexually explicit films in which they appeared. The court thus improperly invoked the First Amendment, and its decision should be reversed.

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* New York Penal Law § 263.15 is reprinted in Appendix F.

Introduction

> *To turn [a child] loose to an unrestrained liberty before he has reason to guide him is not the allowing him the privilege of his nature to be free, but to thrust him out amongst brutes and abandon him to a state as wretched and as much beneath that of a man as theirs.* John Locke, *The Second Treatise of Government* (1690)

> *Have mercy on the youth of both sexes; protect them from their ignorance and inexperience; protect one part of life by the wisdom of another; protect them by the wisdom of laws and the care of Nature.* Edmund Burke, *Speech on Repeal of the Marriage Act* (1781)

Minds as different in their political orientations as Locke and Burke have shared at least one assumption about government: its importance in protecting the young from their naiveté. In our own time the United Nations has demanded that: "The child shall be protected against all forms of neglect, cruelty and exploitation. He shall not be the subject of traffic, in any form." [1] It is only common sense that "childhood is a particularly vulnerable time of life," *Parham* v. *J.R.*, 442 U.S. 584, 628 (1979) (Brennan, J., concurring), and it is a basic assumption of civilized society that the state has a "parens patriae interest in helping parents care for . . . their children." *Id.* at 605.

This Court has always been particularly sensitive to that assumption, permitting the states to shield children from child labor, even in service of proselytizing religious ideas, *Prince* v. *Massachusetts*, 321 U.S. 158 (1944); to protect them from viewing even nonobscene sexually explicit material, *Ginsberg* v. *New York*, 390 U.S. 629 (1968); to guard

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[1] G.S. Resolution 1386 (XIV), 841st Plenary Meeting, Nov. 20, 1959, Principle 9.

them from premature sexual experience, *Michael M.* v. *Sonoma County Superior Court*, 450 U.S. 464, 472 n. 8 (1981); and, after such experience, to protect them against ill-considered parental interference with their decision whether to have an abortion. *Planned Parenthood of Central Missouri* v. *Danforth*, 428 U.S. 52 (1976); *Bellotti* v. *Baird*, 443 U.S. 622, 634-36 (1979) (*Bellotti II*). These decisions only suggest the "variety of protective measures," ranging from commercial constraints to restrictions on marriage, that are justified by the "State's interest in the welfare of its young citizens." *Planned Parenthood of Central Missouri* v. *Danforth*, *supra*, 428 U.S. at 102 (Stevens, J., dissenting).

In 1977 the State of New York and indeed the entire nation was confronted with an extraordinary threat to that welfare, an example of "traffic" in children unmatched since the darkest hours of child labor: child pornography. During that year the U.S. Senate Judiciary Committee concluded, based on extensive hearings, that "child pornography and child prostitution have become highly organized, multi-million dollar industries that operate on a nationwide scale," and that "the use of children . . . as the subjects of pornographic materials is very harmful to both the children and the society as a whole." [2] In response, the federal government and most of the states adopted a series of criminal statutes aimed at the "kiddie porn" plague.[3] Most notable of these is the New York statute under review, a

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[2] Senate Committee on the Judiciary, Protection of Children Against Sexual Exploitation Act of 1977, S. Rep. No. 438, 95th Cong., 1st Sess. 5 (1977).

[3] The Protection of Children Against Sexual Exploitation Act of 1977, 18 U.S.C. §2251-2253 (Supp. III 1979). Some 46 states enacted special laws directed at child pornography during the same period. For a listing of those statutes and a classification of them by approach taken, see Appendix A.

prohibition of the "promotion" (including the exhibition or distribution) of "sexual performances" by children.[4] While carefully defining "sexual performance" to include only very explicit sexual activity,[5] rather than harmless nudity, the New York legislature refused to require proof of the *legal obscenity* of the performance as a predicate to liability.[6]

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[4] N.Y. Penal Law §263.15. The text of the law is reprinted in Appendix F.

[5] The sexual activity covered is limited to "sexual intercourse, deviate sexual intercourse, sexual bestiality, masturbation, sadomasochistic abuse, or lewd exhibition of the genitals." N.Y. Penal Law §263.00 (1).

[6] Thirteen other states also refused to require obscenity as an element of the offense of distributing child pornography. See Appendix A.

It is important to note in viewing the New York statute that "exhibition of the genitals" is prohibited only if it is "lewd". See note 5, *supra*. "Lewd" is generally considered a synonym for "obscene" in construction of statutes such as this one. *Manual Enterprises, Inc.* v. *Day*, 370 U.S. 478, 483 n. 4 (1962) (Opinion of Harlan, J.). *Accord, Hamling* v. *United States*, 418 U.S. 87, 112 (1974). Thus New York Penal Law §263.15 must be construed to include nudity only if such nudity is legally "obscene". Respondent's fears about the prohibition of films containing "mere nudity," Respondent's Brief in Opposition to Petition for a Writ of Certiorari [hereinafter cited as *Respondent's Brief*] 10, are therefore convenient but wholly insubstantial chimeras.

One further aspect of N.Y. Penal Law §263.15 requiring brief comment is its prohibition of "simulated" sexual conduct falling within the specific definitions of such conduct in §263.00(3). The statute prohibits depiction of *simulated* sexual conduct *only* when such depiction includes the exhibition of a child's breasts, genitals or buttocks. Thus it is possible to use child performers in sexually suggestive roles (e.g., "Lolita") so long as their most intimate anatomy is not put on public display. *See, Miller* v. *California*, 413 U.S. 15, 25 (1973).

The statutory definition of "sexual conduct", finally, almost exactly tracks this Court's definition of "hard-core" sexual conduct in *Miller* v. *California, supra*, 413 U.S. at 25. Amicus, therefore, hereinafter refers to the conduct defined by the New York statute as "hard-core."

This case presents the question whether in so exercising its *parens patriae* responsibility for its children New York transgressed rights guaranteed by the First Amendment. Overruling lower courts, the New York Court of Appeals concluded that the statute in question does violate "the freedom of speech" because it curtails the distribution of material without regard to its obscenity. *People* v. *Ferber*, 52 N.Y.2d 674, 678 (1981).

When viewed against the strong tradition of judicial concern for the welfare of children, the decision of the Court of Appeals seems categorical and wrongheaded in the tradition of *Hammer* v. *Dagenhart*, 247 U.S. 251 (1918). When considered against the harms suffered by children in the distribution of "kiddie porn," however, the decision appears no less than barbaric. Children victimized once in the production of pornography may now be made to suffer, over and over again, the agony of knowing their most intimate, private conduct is the subject of public display in perpetuity. The state must stand idly by while the pornography industry profits from the sale of material whose production is illegal under both federal and state law.[7] Those devoted to the life and spirit of the First Amendment, finally, must watch its greatest phrase, "the freedom of speech," twisted into a synonym for freedom to exploit the bodies of children to express sexual perversion. However sincere the intentions which prompted it, *People* v. *Ferber* is a decision that begs for reversal.

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[7] 18 U.S.C. §2251-2253 (Supp. III 1979). For a discussion of other laws bearing on child pornography, see Appendix A.

The Decision Below

The decision before this Court on writ of certiorari is perhaps best summarized in the words of the dissenting judges of the New York Court of Appeals:

> The majority holds today that the State of New York is without power to prohibit the dissemination of films depicting children of tender years engaging in actual or simulated sexual intercourse, sodomy, sexual bestiality, masturbation, sado-masochistic abuse or lewd exhibition of the genitals unless the child's "performance" is determined to be legally obscene.

People v. *Ferber, supra,* 52 N.Y.2d at 681 (Jasen, J.).

In reaching that conclusion the court presented no single clearly defined line of reasoning; rather, it noted three factors about N.Y. Penal Law §263.15 it found "troublesome," *Id.* at 680: (1) the "overbreadth" of the statute in its potential application to "nonobscene" speech such as "medical or educational materials", *Id.* at 678; (2) the statute's potential application to materials produced outside the State of New York, *Id.* at 679-680; and (3) the "strikingly underinclusive" character of the statute in failing to prohibit the distribution of other materials whose production might entail serious harm to minors. *Id.* at 680-81. Conceding the State's "legitimate interest in protecting the welfare of minors within its borders," *Id.* at 679, the Court determined that the "freedom of speech" of "kiddie porn" promoters swept all before it.

If indeed the harms to children from the "kiddie porn" industry were limited to those from actual *production* of child pornography, the majority's opinion might have a certain mad logic to it—similar to the logical exaltation of the "right of contract" over laborers' welfare in

Lochner v. *New York*, 198 U.S. 45 (1905). One simple fact escaped the majority below, however: that the distribution of "kiddie porn" causes new, distinct, and often searing damage to the children put on public display. It is that damage which makes nonsense of the Court of Appeals' fears for the integrity of the First Amendment.

I.

The State Has a Compelling Interest in Protecting Its Children From Display of Their Sexual "Performances".

A. *Distribution of Child Pornography Causes Serious Harms to the Child Performers Which Are Distinct From the Harms Involved in Its Production.*

In summarizing the various types of sexual abuse to which thousands of children are annually subjected, Dr. Melvin Blumberg recently concluded:

> The most depraved form of sexual misuse of children occurs when they are subjected to acts of intercourse, sodomy, or fellatio for peep shows or for film making for financial gain in pandering to the vicarious lasciviousness of those adults who are but one degree less vile than actual sex offenders.[8]

Other physicians and psychiatrists have concluded that participation in the making of child pornography is "devastating," [9] likely to produce "psychic trauma" and "massive acute anxiety" for the children involved,[10] and "highly

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[8] *Child Sexual Abuse*, 78 N.Y. State J. Med. 612, 613 (1978).

[9] Weeks, *The Sexually Exploited Child*, 69 S. Med. J. 848, 850 (1976).

[10] Schoettle, Child Exploitation: *A Study of Child Pornography*, 19 J. Am. Acad. Child Psych. 289, 296 (1980) [hereinafter cited as *Child Exploitation*]; Schoettle, *Treatment of the Child Pornography Patient;* 137 Am. J. Psych. 1109, 1110 (1980).

destructive to the child's psychological development and social maturation." [11] The psychological trauma is such that it can increase significantly the chance that the sexually abused child will one day grow into a sexual abuser.[12] Serious physical consequences may ensue as well.[13] It is thus beyond serious question that "child sexual exploitation is child abuse." [14]

The actual sexual abuse of children in the making of pornographic films or photos does not end their ordeal; it is only the first chapter. For the child has participated in a "graphic form of exhibitionism . . . [which] literally makes the child's body 'available' for anyone willing to pay the price anywhere in the world." [15] Damaging as the initial sexual abuse may be, "it is the *fear of exposure* and the tension of keeping the act secret that seem to have the most profound emotional repercussions." [16] Au-

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[11] Densen-Gerber, *Child Prostitution and Child Pornography: Medical, Legal and Societal Aspects of the Commercial Exploitation of Children*, reprinted in National Center on Child Abuse and Neglect, U.S. Dept. of Health and Human Services, *Sexual Abuse of Children: Selected Readings* (1980) 80.

[12] Groth, *Sexual Trauma in the Life Histories of Rapists and Child Molesters*, 4 Victimology 10 (1979); R. Sullivan, *Child Molestation*, 19 Am. Fam. Physician 127 (1979).

[13] *See, e.g.*, Ellerstein & Canavan, *Sexual Abuse of Boys*, 134 Am. J. Diseases of Children, 255, 256-57 (1980); Jaffe, *Sexual Abuse of Children: An Epidemiological Study*, 129 Am. Med. J. Diseases of Children 689, 691 (1975); Nelson, *Gonorrhea in Preschool and Prepubertal Children*, 236 J. Am. Med. A. 1359, 1364 (1976); Rauh & Burket, *Adolescent Sexual Activity and Resulting Gynecological Problems*, 13 Med. Aspects Hum. Sexuality 56, 57 (1979).

[14] Geiser, *Hidden Victims*, 118 (1979).

[15] *Child Exploitation, supra* note 10, at 292.

[16] *Id.* at 292 (emphasis added). *See also* Shouvlin, *Preventing the Sexual Exploitation of Children: A Model Act*, 17 Wake Forest L. Rev. 535, 545 (1981); Burgess & Holmstrom, *Sexual Trauma of Children and Adolescents*, 10 Nursing Clinic N. Am. 551 (1975).

thorities familiar with sexual abuse generally agree that "[o]ften the child is more disturbed by the *reaction* that the [sexual abuse] brings forth than from the sexual activity itself." [17] The initial "fear of exposure" coupled with the subsequent public exposure through display of the filmed sexual activity virtually assures profound continuing harm for children whose sexual abuse occurs in front of a camera.

This Court has recently taken judicial notice of the "stigma" or "adverse social consequences" to children and adults who have been committed to mental hospitals, *Parham* v. *J.R.*, 442 U.S. 584, 600 (1979); *Addington* v. *Texas*, 441 U.S. 418 (1979), and judicial notice of human "sensitivity" to "the disclosure of information" about a person's "basic competence". *Detroit Edison Co.* v. *NLRB*, 440 U.S. 301, 318 (1979). For the stars of the "kiddie porn" world, the "social consequences" of their sexual abuse are disastrous. Not only must "the victim of sexual exploitation . . . live the rest of his or her life with those memories of what pornography and deviation brings upon [him or her]," [18] he or she must live with the actual film record of the event. Where the film is widely circulated the child (even into adulthood) must suffer the public humiliation of its

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[17] Herjanic & Wilbois, *Sexual Abuse of Children*, 239 J. Am. Med. A. 331, 333 (1978); Fraser, *Child Pornography*, 95 New Statesman 213 (1978); Peters, *Children Who Are Victims of Sexual Assault and the Psychology of Offenders*, 30 Am. J. Psychotherapy 398, 419 (1976); Schultz, *The Child Sex Victim: Social, Psychological and Legal Perspectives*, 52 Child Welfare 147, 150 (1973); Simrel, *et al.*, *Crisis Management of Sexually Abused Children*, 8 Pediatric Annals 317 (1979).

[18] *Sexual Exploitation of Children, Hearings Before the Subcommittee on Crime of the House Committee on the Judiciary*, 95th Cong. 1st Sess. [hereinafter *Sexual Exploitation of Children I.*], 62-63 (testimony of Inv. Lloyd H. Martin, L. A. Police Dept.).

showing;[19] where the film remains uncirculated the victim must fear blackmail.[20]

It is therefore hopelessly naive to conclude, as did the court below, that regulation of the production of child pornography is alone sufficient to suppress its harms. Even if such an approach could be effective, and the evidence indicates that it could not,[21] the deep harms inflicted by circulation and display of material already filmed would continue for the children victimized in the past.[22] Those children would still face the terrors of public exposure and reaction—and the simple fact that

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[19] *See* Lovelace, *Ordeal* (1980). "Once I'm identified my life falls apart. My husband has to leave his job to protect us and to move us somewhere else. Where I'm recognized again and again, I'm the target of freaks and degenerates." *Id.* at 261.

[20] "It was procedure to keep a blackmail photo file of each boy to avoid any squealing . . . ." Gerald S. Richards, convicted for molesting a 10 year-old boy, filmed, processed, and sold child pornography, and sold the sexual services of his young male models. Sneed, *Father Teacher: Tangled Life of Child Pornographer, Chicago Tribune* (May, 1977), reprinted in *Protection of Children Against Sexual Exploitation, Hearings Before the Subcommittee to Investigate Juvenile Delinquency of the Senate Committee on the Judiciary* [hereinafter *Protection of Children*], 95th Cong., 1st Sess., 135-36 (1977).

[21] A case in point is The Protection of Children Against Sexual Exploitation Act of 1977, 18 U.S.C. §2251-2253 (Supp. III 1979), which prohibited the production of material portraying children in sexually explicit conduct *whether* or *not* the final product was obscene. 18 U.S.C. §2251(a). The statute was heralded at its enactment as the key weapon in a national effort against "kiddie porn," yet according to the United States Department of Justice, only one indictment, and no conviction has ever been obtained under that section of the act.

[22] It is possible, of course, that on substantive due process grounds the distribution of films made prior to the date of the statute's enactment would be constitutionally protected. *St. Martin's Press, Inc.* v. *Carey*, 440 F. Supp. 1196 (S.D.N.Y. 1977), *rev'd on other grounds*, 605 F.2d 41 (2d Cir. 1979). This particular statute has, however, been construed to exclude such films from its coverage. *St. Martin's Press, Inc.* v. *Carey*, 605 F.2d 41, 44 (2d Cir. 1979).

"[t]he victim's knowledge of publication of the visual material increases the emotional and psychic harm suffered by the child." [23]

The special psychological and social harms suffered by the "kiddie porn" performer through distribution of the material also make nonsense of the Court of Appeals' finding that the New York statute is "underinclusive" for failing to cover portrayals of other harmful activity such as "dangerous stunts". *People* v. *Ferber, supra,* 52 N.Y.2d at 680-81. Other types of "dangerous" performances, while arguably as hazardous to a child's well-being as sexual abuse, do not, when subsequently shown, cause *new* harms to the child, as does the display of pornographic material. *See, Erznoznik* v. *City of Jacksonville,* 422 U.S. 205, 215 (1975). A child may be injured performing a circus trick, but its subsequent showing in local theatres will not cause "profound emotional repercussions" and the "stigma" that display of the child's involvement in masturbation, bestiality or sado-masochistic abuse would create. New York aimed its arsenal narrowly, and hit the *precise* target intended.

B. *Production and Distribution of Child Pornography Occur Without the Informed Consent of the Minors Involved.*

What makes the use of children in pornography, as opposed to the use of adults, so damaging and so loathesome is that "kiddie porn" is a traffic in slaves. Children, unlike their elders, simply cannot give an "informed consent" to sexual activity.[24] They are "ignorant about sex

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[23] *Protection of Children from Use in Pornography,* 12 J. L. Ref. 295, 301 (1979) (citing an interview with Ann Thompson, consulting child psychiatrist to the U. of Mich. Interdisciplinary Project on Child Abuse and Neglect). *See,* Shouvlin, *supra* note 16, 17 Wake Forest L. Rev. at 545.

[24] A. Rosenfeld, *Treating Victims of Incest,* 8 Br. J. Sexual Med. 5 (1981).

and sexual relationships," "unfamiliar with the mechanics of sex and reproduction," and "generally unaware of the social meanings of sexuality," including "what likely consequences [the sexual act] will have for them in the future."[25] In the context of sexuality and procreation, the members of this Court have been consistently mindful of children's "inability to make decisions in an informed, mature manner." *Bellotti* v. *Baird*, 443 U.S. 622, 634 (1979) (*Bellotti II*) (Opinion of Powell, J.), & 656-57 (White J., dissenting); *Carey* v. *Population Services International*, 431 U.S. 678, 693, n. 15 (1977) & 714 (Opinion of Stevens, J.); *Planned Parenthood of Central Missouri* v. *Danforth*, 428 U.S. 52, 72 (1975) & 95 (White, J., dissenting) & 102 (Stevens, J., dissenting); *Bellotti* v. *Baird*, 428 U.S. 132, 147 (1976) (*Bellotti I*). Last term, indeed, the Court specifically recognized the right of the State to forbid sexual intercourse among the young. *Michael M.* v. *Sonoma County Superior Court*, 450 U.S. 464, 472 n. 8 (1981) & 482-83 (Blackmun, J., concurring) & 496-97 (Stevens, J., dissenting).

The nonconsensual character of child sexual exploitation is severely aggravated by the character of the "kiddie porn" industry, where seduction, coercion, and blackmail are an entrepreneur's most vital skills.[26] Parental influence, incredibly, is all too often thrown behind those desiring to profit from a child's sexual activity.[27] A photographic recording of that activity must therefore be regarded as virtually stolen from the child—a hideous trophy for the seduction or rape of the young.

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[25] D. Finkelhor, *What's Wrong With Sex Between Adults and Children*, 49 Am. J. Orthopsychiatry 692, 694-95 (1979).

[26] *See* Appendices C and D.

[27] *See* Appendix C.

C. *The Nonconsensual Injuries to the Privacy of a Child Caused by Distribution of His or Her Sexually Explicit Performances Justify and Compel the State's Intervention.*

If the film of a 12 year-old boy masturbating may be called "speech," it is "speech" which "by [its] very utterance inflict[s] injury." *Chaplinsky* v. *New Hampshire*, 315 U.S. 568 (1942). Manipulated or coerced into sexual activity, the child must live with a public, or potentially public, recording of the abuse. New York is attempting, against the guile of pornography merchants and the obtuseness of its own Court of Appeals, to protect children from the invasion of privacy and poisoning of reputation which such a filmed record of specifically defined "hard-core" sexual activity inevitably causes. In that effort no legitimate "speech" will be suppressed, and no damage to the First Amendment will be sustained.

That display of a child in the midst of sexual intercourse, masturbation, bestiality or the like invades his or her privacy is beyond cavil. *See, York* v. *Story*, 324 F.2d 450, 455 (9th Cir. 1963), *cert. denied*, 376 U.S. 939 (1964).[28] Sexuality is at the very core of the personal privacy interest for minors as well as adults. *Bellotti II*, 443 U.S. 622 (1979); *Roe* v. *Wade*, 410 U.S. 113 (1973); *Griswold* v. *Connecticut*, 381 U.S. 479 (1965).[29] Whether considered from the standpoint of (1) "the individual interest in avoiding disclosure of personal matters" or (2) "the interest in independence in making certain kinds of important decisions"—the two prongs of the "privacy" interest articulated by this Court in *Whalan* v. *Roe*, 429 U.S. 589, 599-600 (1977) (footnotes omitted)—the nonconsensual replaying of a child's sexual

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[28] *See also, Forts* v. *Ward*, 434 F.Supp. 946 (S.D.N.Y. 1977), *rev'd on other grounds*, 566 F.2d 849 (2d Cir. 1977).

[29] The American concern for privacy in sexual matters is deeply rooted in our past. *See*, Flaherty, *Privacy in Colonial New England* 79-83 (1972).

activity for strangers is gross intrusion on that interest. *York* v. *Story*, *supra*, 324 F.2d at 455.

The "impressive credentials" [30] of the general "right of privacy," date back to the celebrated article of Samuel Warren and Louis Brandeis, *The Right of Privacy*.[31] Now that right receives full recognition in both state and federal courts.[32] Whatever its "developing distinctions and nuances," [33] the legally protectible interest in privacy clearly fits the outrageous conduct proscribed by New York's child pornography statute.[34]

To confront the problem of child pornography head on, therefore, the Court must address a question it has care-

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[30] *Cox Broadcasting Corp.* v. *Cohen*, 420 U.S. 469, 489 (1975).

[31] 4 Harv. L. Rev. 193 (1890). *See, Katz* v. *United States*, 389 U.S. 347, 350-51 (1968).

[32] *See*, W. Prosser, Handbook of the Law of Torts, §§117, 810-812 (4th Ed. 1971); Prosser, *Privacy*, 48 Cal. L. Rev. 383 (1960). Federal cases based on the "right to be let alone by other people" include *York* v. *Story*, 324 F.2d 450 (9th Cir. 1963), *cert. denied*, 376 U.S. 939 (1964), and *Dietemann* v. *Time, Inc.*, 284 F.Supp. 925 (C.D. Cal. 1968), *aff'd*, 449 F.2d 245 (9th Cir. 1971). *But cf.*, *Rosenberg* v. *Martin*, 478 F.2d 520 (2d Cir. 1973), *cert. denied*, 414 U.S. 872 (1973) (use of 42 U.S.C. §1983 to vindicate privacy rights not generally favored absent "outrageous" circumstances).
In *Gelbard* v. *United States*, 408 U.S. 41 (1972) this Court noted with approval that the anti-wiretapping provisions of Title III of the Omnibus Crime Control and Safe Streets Act of 1968, 18 U.S.C. §2510-2529, were the results of Congressional desire for "the protection of privacy". 408 U.S. at 48.

[33] *Zacchini* v. *Scripps-Howard Broadcasting Co.*, 433 U.S. 562, 571 (1977).

[34] At least three of the four "branches" of privacy law recognized by Prosser in his article *Privacy*, *supra* note 32, and by the Restatement (Second) of Torts (1977) are relevant to the distribution of child pornography: (1) "intrusion" into the "private affairs or concerns" of another, *Id.*, §652B; (2) "appropriation" of a name or likeness, *Id.*, §652C; and (3) publicity given to private personal affairs of "no legitimate concern" to the public. *Id.*, §652D.

fully, almost painstakingly, left open: "whether the State may ever define and protect an area of privacy free from unwanted publicity." *Cox Broadcasting Corp.* v. *Cohen*, 420 U.S. 469, 491 (1975). *See, Time, Inc.* v. *Hill*, 385 U.S. 374, 384, n. 7 (1967). Though of course a recognition of privacy rights as against the press—or, as in this case, against "kiddie porn" distribution—will have an impact on First Amendment values, virtually every scholar considering the question has concluded that personal privacy should have some protection against the "speech" of others.[15]

This Court took a giant step toward recognition of the State's right to establish an "area of privacy" for its citizens in *Zacchini* v. *Scripps-Howard Broadcasting Co.*, 433 U.S. 562 (1977), which considered one aspect of traditional privacy law in the context of First Amendment guarantees. There the Court recognized a "right of publicity" protecting a performer from the broadcast of his entire act on a TV news program. The Court held that First Amendment concerns must give way to the performer's "proprietary interest" in his act—a conclusion predicated on its belief that "neither the public nor respondent will be deprived of the benefit of petitioner's performance as long as his commercial stake in his act is appropriately recognized." 433 U.S. at 578.

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[15] *See, e.g.*, Tribe, *Constitutional Law* (1978) 649-51; Emerson, *The Right of Privacy and Freedom of the Press*, 14 Harv. C.R.-C.L.L. Rev. 329 (1979); Hill, *Defamation and Privacy Under the First Amendment*, 76 Colum. L. Rev. 1205 (1976); Prosser, *Privacy*, 48 Calif. L. Rev. 383 (1960). See also, Warren and Brandeis, *supra* note 31 ("It would doubtless be desirable that the privacy of the individual should receive the added protection of the criminal law . . . . [T]hat the community has an interest in preventing such invasions of privacy, sufficiently strong to justify the introduction of such a remedy, cannot be doubted." 4 Harv. L. Rev. at 219). *But see, Kahen, Privacy in Tort Law—Were Warren and Brandeis Wrong?*, 31 Law and Contemp. Prob. 326 (1966).

In this case a young boy's "act" was, without his informed consent, appropriated for the profit of another, and so his "proprietary interest" in his "performance" was impaired. Yet clearly property concepts are inadequate to resolution of the issues here, for it is not the child's "commercial stake" New York has tried to protect. Instead, the state seeks to prevent the "mental pain and distress, far greater than could be inflicted by mere bodily injury" [36] which is the horrible consequence for children of distributing sexually explicit films in which they have performed.[37] Against that desire must be weighed the interest of the public, asserted by Respondent, in having access to the sight of children in the midst of sexual intercourse, masturbation, bestiality, and sado-masochism.

The Court must decide whether the loss of such exhibitions is worth the gain in protection of children's interest in personal privacy. Is it possible, though, that a seasoned circus performer may punish the broadcast of his act on a TV news show[38] while a young boy must endure the continuous display of his sexual abuse in an adult movie theater?[39]

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[36] Warren & Brandeis, *supra* note 31, at 196.

[37] *See*, Point I-A *supra*.

[38] Or Mohammed Ali punish Playgirl Magazine for publishing a "portrait" (not photograph) of him in the nude, *Ali* v. *Playgirl, Inc.*, 447 F. Supp. 723 (S.D.N.Y. 1978). *See also Meeropol* v. *Nizer*, 560 F.2d 1061 (2d Cir. 1977) (Louis Nizer's private letters entitled to copyright protection), *cert. denied*, 434 U.S. 1013 (1978).

[39] It is worth noting that in this case, unlike *Cox Broadcasting Corp.* v. *Cohen*, 420 U.S. 469 (1975), the "speech" prohibited in the name of privacy is not contained in any public document or record. Unlike the subject of publicity in *Time, Inc.* v. *Hill*, 385 U.S. 374 (1967), moreover, sexually explicit photographs of young children could not be considered "newsworthy" items. See Restatement (Second) of Torts, §652D, Comment h (1977) ("There may be some intimate details of her life, such as sexual relations,

D. *In Its Attack on Child Pornography New York Properly Focused on the Need to Protect the Child Performers From Distribution of Such Material.*

The harm to a young child from participation in sexual intercourse, deviate sexual intercourse, bestiality, masturbation, or sado-masochistic abuse is not "supposed", as Respondent pretends;[40] it is coldly real. The additional, *separate* harms from distributing such films and photographs are just as inescapable. They are not harms produced by the distribution of any other type of material, and there is no way to prevent the harms from such distribution short of banning it altogether. Faced with a choice between a minimal effect on free expression from a ban on "kiddie porn", and the continued emotional torture of children who at some point have sold their bodies to make it, New York properly chose the former.

When confronted with a similar choice—between, on the one hand, a woman's First Amendment rights as well as her rights as a mother, and, on the other hand, the right of the State to regulate child labor—this Court made a similar election. *Prince* v. *Massachusetts,* 321 U.S. 158 (1944). The First Amendment does not permit parents "to make martyrs of their children," *Id.* at 170, nor does it require the State to stand by while children become martyrs to some theoretical public "right" to see "kiddie porn".

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which even the actress is entitled to keep to herself."). Sexually victimized children are not "public figures" who have relinquished some control over their privacy. *Compare, Gertz* v. *Robert Welch, Inc.,* 418 U.S. 32 (1974), with *Time, Inc.* v. *Hill,* 85 U.S. 374 (1967).

[40] Respondent's Brief, *supra* note 6, at 5.

II.

Because It Involves Trafficking in an Item Whose Very Production Is Illegal, and Because Such Trafficking Deepens the Harms Caused by Such Production, Distribution of Child Pornography May Be Declared a Crime.

Every citizen of this country is bound to the knowledge that any person "who employs [or] uses . . . any minor to engage in . . . sexually explicit conduct for the purpose of producing any visual or print medium depicting such conduct," is guilty of a federal crime *regardless* whether the final product is legally obscene.[41] 18 U.S.C. §2251(a). A majority of the states, including New York, have similar provisions.[42]

It was thus somewhat disingenuous of the Court of Appeals to remark that this case involves suppression of "materials which are traditionally entitled to constitutional protection . . . under the First Amendment." *People* v. *Ferber*, *supra*, 52 N.Y.2d at 678. Those materials are produced through the sexual abuse of children.[43] They threaten the psychological health and the privacy of those children while in circulation.[44] They are, moreover, viewed by students of the problems as "an adjunct or a tool to the crime" of "sexually assaulting and abusing children." [45] One state

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[41] One additional element that—either (1) the person "knows or has reason to know that such visual or print medium will be transported in interstate or foreign commerce or mailed," or (2) "that such visual or print medium has actually been transported in interstate or foreign commerce or mailed"—is included in the statute for jurisdictional purposes. 18 U.S.C. §2251(a).

[42] See Appendix A.

[43] *See* Point I-A, *supra*.

[44] *See* Point I-A, *supra*.

[45] *Sexual Exploitation of Children, A Report to Illinois General Assembly by the Illinois Legislative Investigatory Commission* 31 (1980). *Accord, Report to the Attorney General on Child Pornography in California* 14-15 (1977).

commission studying the problem declared, "The act of selling these materials is guaranteeing that there will be *additional* abuse of children." [46]

Distribution of sexually explicit performances by children is, therefore, far from an innocent activity; it deepens and extends the harms of the underlying crime of production. As such it is precisely like three federal crimes: the "disclosure" of information obtained by another through illegal wiretapping (18 U.S.C. §2511(1)(c) (1976 and Supp. III 1979)), the "promotion" of "racketeering" activities (18 U.S.C. §1952 (1976)), and the "transmission of wagering information" (18 U.S.C. §1084). None of these federal statutes has presented the courts with any constitutional difficulty.[47] Each of them is directed at "speech" which exacerbates the harms of illegal activity, even where the "speaker" was not directly involved with the underlying crime.

Because the filming of nonconsensual sexual conduct by a child is at least as great an invasion of his privacy as is electronic eavesdropping, for example, there is no principled distinction between the crime of "disclosing" the contents of an illegal wiretap (even a wiretap performed by another), 18 U.S.C. § 2511(1), and the crime of distributing "kiddie porn." [48] The nonconsensual character of the

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[46] *Texas House Select Committee on Child Pornography, Its Related Causes and Control* [hereinafter *Texas Select Committee*] 44 (1978) (emphasis added).

[47] See, *e.g.*, *United States* v. *Cerone*, 452 F.2d 274 (7th Cir. 1971) (anti-racketeering statute); *Truchinski* v. *United States*, 393 F.2d 627 (8th Cir. 1968), *cert. denied* 393 U.S. 831 (1968) (statute prohibiting transmission of wagering information); *United States* v. *Becker*, 334 F.Supp. 546 (S.D.N.Y. 1971) (anti-wiretapping statute). See also, *United States* v. *Nardello*, 393 U.S. 286 (1968) (construing and explaining anti-racketeering provisions).

[48] This Court has already construed with approval the anti-wiretapping provisions of the federal criminal code: "Contrary to the Government's assertion that the invasion of privacy is over

child's participation, indeed, makes "kiddie porn" in essence simply another type of contraband—like the product of illegal child labor (29 U.S.C. §212) or stolen goods (18 U.S.C. §662).[49]

As this Court must grow tired of repeating, the First Amendment is far from an absolute ban on assertion of legitimate governmental interests that affect speech.[50] When those interests include regulation of an underlying activity that is itself illegal, they are particularly powerful supports for limitations on speech: thus a newspaper's placing of job advertisements in gender-designated columns, so furthering illegal sex discrimination, may be enjoined. *Pittsburgh Press Co.* v. *Pittsburgh Comm'n on Human Relations*, 413 U.S. 376, 389 (1973). *See, New York*

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and done with, to compel the testimony of these witnesses [the subjects of an illegal wiretap] compounds the statutorily proscribed invasion of their privacy by adding to the injury of the interception the insult of the compelled disclosure. And, of course, [federal law] makes illegal not only unauthorized interceptions, but also the disclosure and use of information obtained through such interceptions. 18 U.S.C. §2511(1) . . ." *Gelbard* v. *United States, supra*, 408 U.S. at 51-52.

[49] While it is true that motion pictures are excluded from the provisions of the federal child labor statute, 29 U.S.C. §213(c)(3), newspapers and magazines clearly are not. Thus if the *New York Times* made use of a child in "oppressive child labor," in printing its newspapers, the shipment of those papers across state lines would violate federal law. *Cf. Wirtz* v. *Keystone Readers Service, Inc.*, 282 F.Supp. 871 (S.D. Fla. 1968) (magazine subscription service violated 29 U.S.C. §212 in employing high school student at below minimum wage).

[50] *See, e.g., Central Hudson Gas & Electric Corp.* v. *Public Service Comm'n of N.Y.*, 447 U.S. 557, 562-63 (1980); *Friedman* v. *Rogers*, 440 U.S. 1, 9-10 (1979); *Ohralik* v. *Ohio State Bar Ass'n*, 436 U.S. 447, 456 (1978); *Paris Adult Theatre I* v. *Slaton*, 413 U.S. 49, 64 (1973); *Miller* v. *California*, 413 U.S. 15, 23 (1973); *United States* v. *O'Brien*, 391 U.S. 367, 376 (1968); *Roth* v. *United States*, 354 U.S. 476, 484-85 (1957); *Breard* v. *Alexandria*, 341 U.S. 622, 644-45 (1951); *Chaplinsky* v. *New Hampshire*, 315 U.S. 568, 571-72 (1942).

Times Co. v. *United States*, 403 U.S. 713, 733-40 (1971) (White, J., concurring). So, too, a lawyer's in-person solicitation of a client—because of its grave potential for fraud and undue influence—may be proscribed even in the face of First Amendment guarantees protecting attorney advertising in general. *Ohralik* v. *Ohio State Bar Ass'n*, 436 U.S. 447 (1978).[51]

"Abuse for profit is manifested in child prostitution and child pornography and has created a multimillion dollar industry built on physical and psychological brutalization of thousands of our young citizens."[52] New York, in attacking distribution of "kiddie porn," is striking at the economic linchpin of that industry, and perhaps the most damaging part of the "brutalization" process as well.[53] In so doing it is not attacking the legitimate expression of ideas, only suppressing criminal activity inimical to the well-being of its youth. See, *United States* v. *O'Brien*, 391 U.S. 367, 376 (1968).

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[51] The prohibition of in-person solicitation by an attorney may, at first, seem merely a "time, place and manner" regulation subject only to limited judicial scrutiny. The Court in *Ohralik* did not treat it as such, however, preferring to treat it as a "content" regulation but one falling within "commercial speech" subject to reasonable state regulation. 436 U.S. at 456.

[52] Texas Select Committee, *supra* note 46, at 44.

[53] See text to notes 14-20, *supra*.

III.

The Lower Court's Focus on the Place of Production Rather Than That of Distribution of Child Pornography Was Clear Error.

The refusal of the Court of Appeals to examine the harms to a child "star" from distribution of pornographic films was undoubtedly the key factor subverting its capacity to analyze the statute before it. Indeed, the court's conceptual failure on this point led in its opinion to one particularly unfortunate excrescence: the statement that it is "troublesome" for New York to attack the distribution of materials in which "the [sexual] act recorded may have occurred in another State or county where such conduct may not be prohibited." *People* v. *Ferber*, 52 N.Y.2d at 680.

The Court of Appeals' doubts are completely without basis. Distribution of "kiddie porn" causes harm to the children so displayed at the place of the display: it is there that their private conduct is made public; it is there that their reputations are permanently damaged. It is elementary that "where harm is done to the reputation of a person, the place of wrong is where the defamatory statement is communicated." Restatement of the Law of Conflict of Laws (1934), §377, Rule 5. Criminal prosecution for libel is proper wherever the libelous article was published or circulated, not where it was written or printed. *Sachs* v. *Government of Canal Zone*, 176 F.2d 292 (5th Cir. 1949), *cert. denied*, 338 U.S. 858 (1949). A crime involving the mailing of a letter is triable in the place where the letter was received, *In re Palliser*, 136 U.S. 257 (1890); a conspiracy may be punished in the place of the overt act as well as of the criminal agreement, *Hyde* v. *United States*, 225 U.S. 347 (1912); and a mur-

der is most properly punished in the state where the bullet hit its mark, not where it was fired. *United States* v. *Davis*, 2 Sumner 482, 25 Fed. Cas. 786 (Cir. Ct. Mass. 1836) (Story, J., as circuit justice). Thus the injuries to children from display of "kiddie porn" should be redressed and punished in the jurisdiction of impact—the site of distribution.

On a less theoretical level, it seems clear that a "kiddie porn" producer would have to search long and hard for a jurisdiction in which to produce his films legally. Federal law,[54] of course, as well as the laws of almost every state,[55] prohibit production of "kiddie porn", as do the laws of other western countries with an equal commitment to the fundamental values of free expression. Production and distribution of "kiddie porn" without regard to its obscenity is punished as a crime in the United Kingdom,[56] West Germany,[57] Sweden,[58] and probably other countries as well.[59] New York is simply punishing what would be considered a heinous act in any civilized society.

It is an indication of the bankruptcy of the Court of Appeals' position on this point that Respondent has not even referred to this line of reasoning in arguing for the cor-

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[54] 18 U.S.C. §§2251-2253 (Supp. III 1979).

[55] See Appendix A.

[56] Protection of Children Act of 1978, Chapt. 37.

[57] German Penal Code, Paragraphs 176 and 184.

[58] Swedish Criminal Code, Chapt. 16, Paragraph 10.

[59] *See, e.g.*, French Penal Code, Art. 3419. According to Fred Cohen, Executive Director of Odyssey Institute, "The Europeans have much stronger laws against using kids in this way . . . Ninety percent of all child porno in the world comes from America." Quoted by Rep. Robert A. Young, *Congressional Record* (April 26, 1977) 12318. Some western democracies, of course, take a far stricter view than does the United States regarding obscenity. *See, e.g.*, Rangel, *Mexican Law on Obscenity*, 7 Law Am. 337 (1975).

rectness of the decision below. That the Court of Appeals could find "troublesome" so undisputed a principle is an indication of how far off course it would drift in the far more troubled seas of First Amendment analysis.

IV.

Photographs and Motion Pictures as a Form of Speech Should Be Subject to Reasonable Regulations for the Protection of Performers, and This Statute Is Such a Regulation.

That films and photographs are part of the "speech" protected by the First and Fourteenth Amendments is not open to doubt. *Joseph Burstyn, Inc.* v. *Wilson,* 343 U.S. 495 (1952). Yet even while proclaiming that postulate in *Joseph Burstyn,* the Court was careful to note: "It does not follow that the Constitution requires absolute freedom to exhibit every motion picture of every kind at all times and all places. . . . Nor does it follow that motion pictures are necessarily subject to the precise rules governing any other particular method of expression. Each method tends to present its own peculiar problem." 343 U.S. at 502-03.

Even a passing consideration of the nature of photographic "speech" points to the wisdom of the Court's *caveat.* Unlike the spoken or written word, photographs of men and women require the participation of more than one person—both the person photographed and the photographer. In the case of commercial pictures, of course, thousands of people may be involved; yet only a handful may have any authority to determine the content of the final product, the "speech" which the Constitution protects.

The performers in filmed "speech" are in a particularly awkward position, for the photography constitutes a perma-

nent record of their actions. The photographs or film may, in fact, represent a conception of the photographer unknown to the photographed subjects at the time of filming—yet their faces are ultimately linked inextricably in viewer's mind with the "speech" contained in the film. In this case, indeed, the type of film before the Court involves a record of activity by the child performers to which they are incapable, as a matter of law, of giving an "informed consent." *See, Elkington* v. *Foust*, 618 P.2d 37 (Utah 1980). Because the filmed activity is in fact intimate sexual conduct, the child performer is associated, involuntarily, with "speech" of a particularly revealing and degrading kind.

In *Zacchini* v. *Scripps-Howard Broadcasting Co.*, 433 U.S. 562 (1977) this Court recognized the *property* interest of a performer in his filmed performance—a principle wholly consistent with a writer's copyright powers over his writing. The children shown in the films sold by Respondent presumably have similar "property" rights; yet it seems more appropriate to view their position not from the standpoint of property but from that of basic human dignity. *Compare, Olmstead* v. *United States*, 277 U.S. 438 (1928) *with Katz* v. *United States*, 389 U.S. 347 (1968). Because a child "is not possessed of that full capacity for individual choice which is the presupposition of First Amendment guarantees," *Ginsberg* v. *New York*, 390 U.S. 629, 649-50 (1968) (Stewart, J., concurring), he becomes permanently associated with "speech" involuntarily.

In a "kiddie porn" movie, therefore, the "speech" is not that of the child performer. If "speech" we must call it, it is the speech of the director or photographer. Once that is acknowledged, however, it is clear that the New York statute is not, as the court below thought, a regulation of the "content" of speech, but rather simply of the *manner* in which speech (that is, the idea or image of juvenile sex) is

presented. No one is being ordered to cease speaking or making movies about adolescent sex. New York has simply declared that in presenting a point of view on that subject the "speaker" may not make use of children's actual bodies in specifically defined "hard-core" sexual conduct, whether in person or in a photograph.

As a regulation simply on the *manner* of self-expression, this statute easily passes muster, for it fulfills the test that it "serve significant state interests . . . [and] leave open adequate alternative channels of communication." *Schad* v. *Borough of Mt. Ephraim*, —— U.S. ——, 68 L.Ed. 2d 671, 684-85 (1981); *Grayned* v. *City of Rockford*, 408 U.S. 104 (1972). Protection of children from sexual abuse is a state interest of the highest order. As for "adequate" alternatives to films of children in full sexual thrall, is it not reasonable to ask Respondent to hire underdeveloped adults, or better, to write a book?

New York Penal §263.15 does no more than reasonably restrict the manner in which an adult can exercise his freedom of speech through a camera lens. It is a law "to protect the weak, the uninformed, the unsuspecting, and the gullible from the exercise of their own volition." *Paris Adult Theatre I* v. *Slaton*, 413 U.S. 49, 64 (1973).

CONCLUSION

The "peculiar vulnerability" of children, *Bellotti II*, 443 U.S. 622, 634 (1979), largely puts them at the mercy of their elders. As Jane Addams wrote during the long struggle for child labor legislation, "We may either smother the divine fire of youth or we may feed it".[62] New York in this

[62] Excerpt from *The Spirit of Youth and the City* (1910), reprinted in Bremner, *Children and Youth in America*, Vol. II (1971) 85. *See* Appendix E.

case has valiantly attempted to interpose its police power between the greed of "kiddie porn" promoters and the hapless children threatened with public humiliation and degradation.

The interests of those children must be paramount in any dispassionate analysis of New York's effort. Yet this case demonstrates how the interests of the individual child performers are intimately linked with other societal interests of the highest importance. Those children in their weakness and immaturity argue for the existence of "the right to be let alone—the most comprehensive of rights and the right most valued by civilized men," *Olmstead* v. *United States*, 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting)—even in the face of our concern for legitimate avenues of self-expression. They argue, too, for the existence of state power to regulate "speech" which is the fruit of illegal activity and harmful in itself. The obvious damage sustained by children in the production of "kiddie porn", finally, illustrates the need to permit some regulation of photographic "speech" in order to protect the subjects photographed.

No mere law will obliterate the long legacy of child exploitation that has culminated in a multi-million dollar child pornography industry. Yet here New York has acted reasonably and responsibly to protect "society's transcendent interest in protecting the welfare of children" [63] to the full extent of its power. Surely, in light of that interest, "kiddie porn" is "utterly without redeeming social importance," *Roth* v. *United States*, 354 U.S. 476, 484-85 (1957), and thus alien to the great values which give life to the First Amendment. The need of some pathetic souls for

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[63] *Ginsberg* v. *New York*, 390 U.S. 629, 640 (1968) (*quoting People* v. *Kahan*, 15 N.Y.2d 311, 312 (1965) (Fuld, J. concurring)).

vicarious, perverse pleasure should not be permitted to make thousands of children martyrs to sexual mass marketing.

The decision of the New York Court of Appeals should be reversed.

Respectfully submitted,

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APPENDIX A

State Statutes Directed Against Child Pornography and Leading Law Review Articles

New York Penal Law §263.15 (McKinney 1980), the statute in controversy, proscribed the distribution of materials which depicted children engaged in explicit sexual acts without insisting the material be obscene. Thirteen other states enacted like provisions: Ariz. Rev. Stat. Ann. §§13-3508, -3551 to -3555 (1978 & Supp. 1981); Col. Rev. Stat. §18-6-403 (Supp. 1980); Del. Code Ann. tit. 11 §§1103, 1108-1110 (1979); Haw. Rev. Stat. §§707-750 to -751 (Supp. 1980); Ky. Rev. Stat. §§531.300 to .370 (Supp. 1980); La. Rev. Stat. Ann. §14:81.1 (West Supp. 1981); Miss. Code Ann. §§97-5-31 to -37 (Supp. 1980); Mont. Rev. Codes Ann. §45-5-625 (1979); N.J. Stat. Ann. §2C:24-4 (West Supp. 1981); R.I. Gen. Laws §§11-9-1 to -3 (Supp. 1980); Tex. Penal Code Ann. tit. 9 §§43.23, .25 (Vernon Supp. 1980); W. Va. Code §§61-8C-1 to -3 (Supp. 1980); Wis. Stat. Ann. §940.203 (West Supp. 1980).

Four states except material in which nudity was presented for artistic, literary, scientific, educational or political purposes: Mass. Ann. Laws ch. 272, §§29A, 30D, 31 (Michie/Law Co-op 1980); Mich. Comp. Laws Ann. §750.145c (Supp. 1981); 18 Pa. Cons. Stat. Ann. §6312 (Purdon Supp. 1981); S.D. Comp. Laws Ann. §§22-22-22 to -25 (1979).

One state excepts material that reflects bonafide scientific or educational research or a bonafide object of art, which is not related to prurient interest: Okla. Stat. Ann. tit. 21 §§1021.1 to .3 (West Supp. 1980).

The Protection of Children Against Sexual Exploitation Act of 1977, 18 U.S.C. §§2251-2253 (Supp. III 1979), applies to distribution of child pornography only if the material is

legally "obscene." Additionally, eighteen states prohibit the distribution of child pornography only if legally obscene: Ala. Code §§13-7-203 to -238 (Supp. 1979); Ariz. Rev. Stat. Ann. §§13-3508, -3551 to -3555 (1978 & Supp. 1981); Ark. Stat. Ann. §§41-4201 to -4205 (Supp. 1981); Cal. Lab. Code §§1309.5 to .6; Cal. Penal Code §§311.2(b), 311.4 (West Supp. 1981); Conn. Gen. Stat. Ann. §§53a-196a to -196(b) (West Supp. 1981); Fla. Stat. Ann. §847.014 (West Supp. 1981); Ill. Ann. Stat. ch. 38, §11-20a (Smith-Hurd 1979); Ind. Code Ann. §§35-30-10.1-2 to -3, 35-42-4-4 (Burns 1979); Me. Rev. Stat. Ann. tit. 17, §§2921-2923 (Supp. 1980); Minn. Stat. Ann. §617.246 (West Supp. 1981); Neb. Rev. Stat. §§28-1463 to -1464 (1979); N.H. Rev. Stat. Ann. §§650:1-2 (Supp. 1979); Ohio Rev. Code Ann. §§2907.32.1, 2919.22 (Page Supp. 1981); Or. Rev. Stat. §§163.477 to .495 (1979); Tenn. Code Ann. §§39-1019, -1020, 50-707 to -717 (1977 & Supp. 1980); Tex. Penal Code Ann. tit. 9, §§43.23, .25 (Vernon Supp. 1980); Va. Code §§40.1-100(F), 18.2-374.1 (Supp. 1980); Wash. Rev. Code Ann. §§9.68A .010 to .900 (Supp. 1981).

All of the states whose laws prohibit the distribution of child pornography also prohibit its production. Eight states prohibit the production, but not the distribution, of child pornography even if it is not legally obscene: Alaska Stat. §11.41.455 (1980); Ga. Code Ann. §§54-309.1, 26-9943a (Supp. 1980); Iowa Code Ann. §728.12 (West 1979); Kan. Stat. Ann. §21-3516 (Supp. 1980); Mo. Ann. Stat. §568.060 (Vernon 1979); Nev. Rev. Stat. §§200.501, 5011(79) .509 (1980); N.M. Stat. Ann. §30-6-1 (Supp. 1980); Utah Code Ann. §§76-10-1206.5 (Supp. 1979).

Five states, finally, prohibit the production, but not the distribution of child pornography, if it is legally obscene: Md. Ann. Code art. 27 §419A (Supp. 1980); N.C. Gen. Stat.

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§14-190.6 (Supp. 1979); N.D. Cent. Code §§12.1-27.1-02, -03 (1976 & Supp. 1979); S.C. Code §§16-15-380, 16-15-440 (Supp. 1980); Wyo. Stat. §14-3-102 (1978).

The constitutionality of these various statutory approaches has been considered, with varying results, by a number of commentators. *Compare* Shouvlin, *Preventing the Sexual Exploitation of Children,* 17 Wake Forest L. Rev. 535, 559-560 (1981) (ban on distribution of child pornography constitutional even without obscenity requirement), and Note, *Protection of Children from Use in Pornography,* 12 J. L. Ref. 295, 312-18 (1979) (constitutional); *with* Note, *Child Pornography Legislation,* 17 J. Fam. L. 505 (1978-79) (unconstitutional) and Note, *Child Pornography: A New Role for the Obscenity Doctrine,* 1978 U. Ill. L. F. 711, 740-744 (unconstitutional). *See,* Baker, *Preying on Playgrounds: The Sexploitation of Children in Pornography and Prostitution,* 5 Pepperdine L. Rev. 809, 824-832 (1978) ("If the state can constitutionally protect a minor's welfare by restricting materials available to him or her, it follows that the state possesses authority to prohibit publication of sexually explicit materials which use minors as subjects." *Id.* at 831) None of these commentaries considers the impact of children's privacy rights on the First Amendment questions, nor the fact that photographing children engaged in sexual conduct is, unlike the photographing of adult sexual activity, illegal under federal law. *See* Emerson, *The Right of Privacy and Freedom of the Press,* 14 Harv. C.R.-C.L.L. Rev. 383 (1980); A.B.A. Nat'l Legal Resource Center for Child Advocacy and Protection, *Child Sexual Exploitation* (1981).

APPENDIX B

Effects of Sexual Exploitation of Children

The academic literature concerning the sexual abuse of children has recently burgeoned. Where "[p]sychiatrists in the past have erred in the direction of ascribing to childhood fantasy real cases of sexual assault upon children," Peters, *Children Who Are Victims of Sexual Assault,* 30 Am. J. Psychotherapy, 398, 420 (1976), the subject is no longer professionally taboo. The following is a representative sample of the recent books and articles bearing on the effects of sexual exploitation on the child victims.

I. Professional Studies

A. Burgess & L. Holmstrom, *Accessory-to-Sex: Pressure, Sex and Secrecy,* in Burgess *et al.,* Sexual Assault of Children and Adolescents 85, 94 (1978) (Effects of nonconsensual sexual relations noted include "changes in sleep patterns" and "early prostitution in mid-adolescence or before, early access to drugs or alcohol, poor school performance, decrease in physical health status, apathy or listlessness, and sexual disfunction. . . .").

Burgess & Holmstrom, *Sexual Trauma of Children and Adolescents,* 10 Nursing Clinic N. Am., 551 (1975).

DeFrancis, Vincent. *Protecting the Child Victim of Sex Crimes Committed by Adults* (Amer. Humane Assoc. 1969) (The seminal work in exposing the scope of sexual abuse and its consequences; emotional damage found to have occurred in two-thirds of child victims surveyed, severe emotional damage in 14% of the victims, *id.* at 169).

Ellerstein & Canavan, *Sexual Abuse of Boys,* 134 Am. J. Diseases of Children 255, 256-57 (1980) (". . . the sexual

abuse itself results in physical trauma to a large percentage of the boys.").

Finch *et al., Adult Seduction of the Child: Effects on the Child,* 7 Med. Aspects of Human Sexuality 170, 185 (1973) (". . . the vast majority of sexual seductions of youngsters cause some residual personality problems.").

D. Finkelhor, *Sexually Victimized Children* (1979) (experiences of sexual abuse "highly traumatic"; two-thirds of children told *no one* about the experience, *id.* at 66-67).

Fraser, *Child Pornography,* 95 New Statesmen 213 (1978) ("It is my firm impression . . . that the uproar and publicity that follows discovery of such incidents is frequently more emotionally damaging to the child than the experience itself. . ." *Id.* at 213).

Goldston, *Current Thinking on Sexual Abuse of Children,* 12 Med. Aspects of Human Sexuality 44 (1978).

Greenberg, *The Epidemology of Childhood Sexual Abuse,* 8 Pediatric Annals 289, 297 (1978) (sexual relations with adult parent "an overwhelmingly painful, traumatic experience" for children).

Groth, *Sexual Trauma in the Life Histories of Rapists and Child Molesters,* 4 Victimology 10 (1979) (higher incidence of sexual molestation in childhood history of sex offenders than in that of nonoffenders).

Herjanic & Wilbois, *Sexual Abuse of Children,* 239 J. Am. Med. A. 331, 333 (1978). ("Often the child is more disturbed by the reaction that the behavior [sexual abuse] brings forth than from the sexual activity itself.").

Jaffe, *Sexual Abuse of Children,* 129 Am. J. Diseases of Children 689, 691 (1975) ("Our data suggest that sexual

abuse has relatively low but significant physical morbidity.").

James, *et al., Physician Reporting of Sexual Abuse of Children,* 240 J. Am. Med. A. 1145, 1146 (1978) ("These results tend to support the view that the actual frequency of child sexual abuse far exceeds the reported cases.").

R. & H. Kempe, *Child Abuse* (1978) ("We believe *all* sexual exploitation is harmful." *Id.* at 56).

Lewis & Sarrell, *Some Psychological Aspects of Seduction, Incest, and Rape in Childhood,* 8 J. Am. Acad. Child Psych., 606, 618 (1969) ("Chronic anxiety . . . may be experienced when there are repeated experiences of an associated nature, all tending to interfere with the resolution of developmental tasks and each making the child more vulnerable. . . .").

Nelson, *Gonorrhea in Preschool and School-Aged Children,* 236 J. Am. Med. A. 1359, 1364 (1976) ("Gonorrhea is a rather common infection in prepubertal children. . . .").

Paulson, *Incest and Sexual Molestation Clinical and Legal Issues,* 7 J. Clinical Child Psych. 177, 180 (1978) ("Some national attention has focused on child (kiddy) pornography as one manifestation of sexual abuse of children. However, more concern seems to be expressed for the protection of the First Amendment rights of porno film producers than is expressed for the victim and his/her family." *Id.* at 177. "For many mothers, the humiliation forthcoming from the awareness of sexual abuse is intolerable . . . [with] dire consequences for the minor." *Id.* at 178).

Peters, *Children Who Are Victims of Sexual Assault and the Psychology of Offenders,* 30 Am. J. Psychotherapy

398, 419 (1976) (reaction of family and others to sexual assault as traumatic for child as the experience itself).

Schultz, *The Child Sex Victim: Social, Psychological and Legal Perspectives,* 52 Child Welfare 147, 150 (1973) ("By far the greatest potential damage to the child's personality is caused by society and the victim's parents . . .")

L. Schultz, *Kiddie Porn: A Social Policy Analysis* (U. W. Va. 1977).

Sgroi, *Pediatric Gonorrhea Beyond Infancy,* 8 Pediatric Annals 326, 327 (1979) (12.2 per 100,000 children aged 4 to 12 infected with gonorrhea).

Shamroy, *A Perspective on Childhood Sexual Abuse,* 25 Social Work 128, 131 (1980) (discusses the "psychosocial trauma that the child [sexual assault victim] experiences in testifying in front of numerous strangers").

Simrel, *et al., Crisis Management of Sexually Abused Children,* 8 Pediatric Annals 317 (1979) (". . . the psychological trauma that children may suffer as a consequence of sexual abuse is directly related to the reactions of parents, society, and personnel in the medical, legal, and social service agencies and institutions that deal with these situations." *Id.* at 317).

Summit & Kryso, *Sexual Abuse of Children: A Clinical Spectrum,* 48 Am. J. Orthopsychiatry 237, 239 (1978) ("The experience of the authors in the Los Angeles area indicates a much higher prevalence and much more significant mental health impact from sexual abuse than is commonly recognized.").

Tilelli, *et al., Sexual Abuse of Children,* 302 New Eng. J. Med. 319, 322 (1980). (seventeen percent of child vic-

tims of sexual offenses needed medical attention; also noted "a trend in these children toward persistent somatization, nightmares and phobias"). *See* Stechler, *Facing the Problem of the Sexually Abused Child,* 302 New Eng. J. Med. 348, 349 (1980). (criticizes the Tilelli article for its "absence of psychologic data" and deplores the "all too frequent omission from the health care system of consideration of psychological damage to sexually exploited children").

Tsai, *et al., Childhood Molestation: Variables Related to Differential Impacts on Psychosexual Functioning in Adult Women,* 88 J. Abnormal Psych. 417 (1979).

Weiss & Berg, *Child Victim of Sexual Assault: Impact of Court Procedures,* (Mimeographed) Presented at the annual meeting of the American Academy of Child Psychiatry, Chicago, 1980. ("Most children resist going to trial because of the embarrassment of having to relate in front of strangers the details of the sexual assault." *Id.* at 12.).

II. Legislative Inquiries

Sexual Exploitation of Children: Hearings Before the Subcommittee on Crime of the House Committee on the Judiciary, 95th Cong., 1st Sess. (1977) [hereinafter *House Sexual Exploitation Hearings*].

Sexual Exploitation of Children: Hearings Before the Subcommittee on Select Education of the House Committee on Education and Labor, 95th Cong., 1st Sess. (1977).

Protection of Children Against Sexual Exploitation: Hearings Before the Subcommittee to Investigate Juvenile Delinquency of the Senate Committee on the Judiciary, 95th Cong., 1st Sess. (1977).

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Child Pornography: Its Related Causes and Control, Interim Report of Select Committee on Child Pornography, Texas House of Representatives (1978) [hereinafter *Child Pornography*].

Obscenity and the Use of Minors in Pornographic Material: Hearing before California Assembly Committee on Criminal Justice (San Diego, October 31, 1977) [hereinafter *Obscenity and the Use of Minors*].

Sexual Exploitation of Children: A Report to the Illinois General Assembly by the Ill. Legislative Investigating Commission (1980) [hereinafter *Sexual Exploitation of Children: A Report to the Illinois General Assembly*].

III. Popular Works

T. Able-Peterson, *Children of the Evening* (1981) (The author, herself a former prostitute, worked with sexually exploited children for several years in her capacity as counsellor in the Under 21 crisis shelter operated by Covenant House.).

R. Geiser, *Hidden Victims* (1979) (The author, Chief Psychologist at the Nazareth Child Care Center in Boston, concludes, "It would seem sensible to attack child pornography on the grounds that it is abuse rather than on the murky grounds of obscenity. Most health professionals would agree that child sexual exploitation is child abuse." *Id.* at 118.).

S. Janus, *The Death of Innocence* (1981).

C. Linedecker, *Children in Chains* (1981).

F. Rush, *The Best Kept Secret: Sexual Abuse of Children* (1980).

APPENDIX C

Consent of Children to Participation in Child Pornography

Whether a child can "consent" to his or her participation in the production of child pornography has not been extensively explored by the academic community. The most direct consideration of the question has been given by Dr. David Finkelhor, author of *Sexually Victimized Children* (1979):

> "Can children give informed consent to sex with adults? It is fairly evident that they cannot. For one thing, children lack the information that is necessary to make an 'informed' decision about the matter. They are ignorant about sex and sexual relationships. It is not only that they may be unfamiliar with the mechanics of sex and reproduction. More importantly, they are generally unaware of the social meanings of sexuality. For example, they are unlikely to be aware of the rules and regulations surrounding sexual intimacy, and what it is supposed to signify. They are probably uninformed and inexperienced about what criteria to use in judging the acceptability of a sexual partner. They probably do not know much about the 'natural history' of sexual relationships, what course they will will take. And, finally, they have little way of knowing how other people are likely to react to the experience they are about to undertake, what likely consequences it will have for them in the future."

Finkelhor, *What's Wrong With Sex Between Adults and Children*, 49 Am. J. Orthopsychiatry 692, 694-95 (1979). *See* Rosenfeld, *Treating Victims of Incest*, 8 Br. J. Sexual Med. 5, 10 (". . . a young child is incapable of giving an

informed consent [to sexual activity]."); Schwartzman, *The Individual, Incest and Exogamy*, 37 Psychiatry 171 (1974). *See* also, Rauh & Burket, *Adolescent Sexual Activity and Resulting Gynecological Problems*, 13 Med. Aspects of Human Sexuality 56, 57 (1979) (noting the often "serious complications . . . [and] tragic consequences of early adolescent sexual activity.")

Other scholars have independently corroborated the absence of children's "informed consent" in the actual functioning of the child pornography industry. *See*, Guio, Burgess & Kelly, *Child Victimization: Pornography and Prostitution*, 3 J. Crime & Just. 65, 68 (1980) (physical abuse and blackmail); L. Schultz, *Kiddie Porn: A Social Policy Analysis* 15-18 (U. W. Va. 1977).

The record of Congressional hearings leading to the enactment of the Protection of Children Against Sexual Exploitation Act of 1977 (18 U.S.C. §§ 2251-2253 (Supp. III 1979) is replete with testimony concerning the manipulation and coercion of the young to produce "kiddie porn". *See Sexual Exploitation of Children I, supra* note 12; *Sexual Exploitation of Children, Hearings Before the Subcommittee on Education and Labor*, 95th Cong., 1st Sess. (1977) (hereinafter *Sexual Exploitation of Children II*); *Protection of Children Against Sexual Exploitation, Hearings Before the Subcommittee to Investigate Juvenile Delinquency of the Senate Committee on the Judiciary*, 95th Cong., 1st Sess. (1977) (hereinafter *Protection of Children Against Sexual Exploitation*). *See especially, Sexual Exploitation of Children II, supra* at 42-43 (lease, then sale of 9-year-old boy by parents to older man for sexual molestation)(testimony of Lloyd H. Martin, L.A. Police Dept.); *Id.* at 66-68 (identifying child pornography actors as: (1)

"throwaways, . . . who are neglected and abused"; (2) the "children of parents involved in sexual industries" who are "as young as 6 years old"; and (3) the children of a "parent so [economically] desperate that he knowingly and willingly permits the child to be so abused") (statement of Joseph Freitas, Jr., San Francisco District Attorney); *Id.* at 112 ("I could continue to present case after case; a veritable litany of woes to support what has been claimed: That large numbers of American children are being coerced into performing sexual acts for pornographers.") (statement of Robin M. Lloyd, author of *For Money Or Love: Boy Prostitution in America*); *Id.* at 116 (kidnapping of 11-year-old boy in Texas for possible sale in Mexico to pornography producers) (testimony of Robin M. Lloyd); *Protection of Children Against Sexual Exploitation, supra* at 60 (camp in Michigan for "nice neighbor who the family trusted" to take child to be "tested" for use as pornographic model) (testimony of Michael Sneed, Chicago *Tribune* reporter).

Covenant House began its own work when Father Bruce Ritter gave shelter to a group of 10 children who had starred in a pornographic movie out of desperation for food and shelter. *Sexual Exploitation of Children II, supra* at 249-250.

APPENDIX D

Structure of Pornography Industry

Of interest in examining the nature of the child pornography industry is the following material, which is not by any means an exhaustive list:

The Report of the Commission on Obscenity and Pornography 7-25, 83-168 (1970). ("Most large exploitation producers act as their own distributors and also distribute films for smaller companies. . . ." *Id.* at 96.). So huge has been the revolution in the pornography industry during the last decade that the Commission's finding that "full male nudity is virtually unknown," *id.* at 11, now seems quaint, while its omission of *any* discussion of child pornography is disturbing. *See id.* at 100-101, 136-142 ("The use of pre-pubescent children in stag films is almost nonexistent." *Id.* at 139.).

Barrett, *Inside the Mob's Smut Rackets,* 103 Readers' Digest 128 (Nov. 1973).

Burgess, *et al., Child Sex Initiation Rings,* 51 Am. J. Orthopsychiatry 110 (1973).

Child Pornography, supra 9a (Appendix B, Part II).

Denison, *Smut: The Mafia's Newest Racket,* 99 Readers' Digest 157-160 (Dec. 1971).

Denison, *"Sultan of Smut."* 107 Readers' Digest 105 (Nov. 1975).

Guio, *et al., Child Victimization: Pornograph and Prostitution.* 3 J. Crime & Just. 65 (1980).

"Kiddie Porn" 60 Minutes. (Mimeographed) (transcript of CBS telecast of May 15, 1977).

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R. Lloyd, *For Money or Love: Boy Prostitution in America* (1977). The definitive popular description of sexual exploitation of young men.

Obscenity and the Use of Minors, supra 9a (Appendix B, Part II).

Protection of Children Against Sexual Exploitation, Hearings Before the Subcommittee to Investigate Juvenile Delinquency of the Senate Committee on the Judiciary, 95th Cong., 1st Sess. (1977) (hereinafter *Protection of Children Against Sexual Exploitation*). *See especially* pp. 48-57 (Bernard Carey), 57-64 (George Bliss & Michael Sneed).

C. See, *Blue Money* (1974). An anecdotal view of the pornography industry.

Sexual Exploitation of Children, Hearings Before the Subcommittee on Crime of the House Committee on the Judiciary, 95th Cong., 1st Sess. (1977). *See especially* pp. 59-73 (Inv. Lloyd Martin, Los Angeles Police Dept.).

Sexual Exploitation of Children: A Report to the Illinois General Assembly, supra 9a (Appendix B, Part II).

Sneed, *et al.*, Series of investigative articles appearing in *Chicago Tribune* May 15-18, 1977, reprinted in *Protection of Children Against Sexual Exploitation, supra* 11a (Appendix C) at 130-150. The most significant of the journalistic analyses of the "kiddie porn" industry.

APPENDIX E

In the course of the 1977 Congressional hearings on sexual exploitation of the young, the following exchange occurred among Congressman Ashbrook, Herald P. Fahringer. Esq. and Mr. Larry Flynt:

MR. ASHBROOK. . . . I guess I would direct this question to you, Mr. Flynt, but I guess in general to Mr. Fahringer too. You both seem to come down on nudity and talk in those terms. But if we could shift a minute, *is it your contention that explicit sexual acts by children,* whether in film or in print, *are protected constitutionally, and therefore,* the film and publication and *distribution is* both *a constitutional problem?*

MR. FAHRINGER. *No; I don't urge that.* What troubles me more about the law is when you get into the area of the gray situations, simulated. I can easily see how a very artistic film could be made that would suggest in no uncertain terms a young girl like Jody Foster in Taxi Driver having intercourse with a man that was an integral part of the story. I would hate to see those films sanitized to the degree that there can be none of that, not even a suggestion of sexual conduct, which very often plays a dynamic part in these things.

MR. ASHBROOK. That is why I used the word *"explicit." It is your contention that explicit sexual acts by children could come under the area of some protection?*

MR. FAHRINGER. *Yes; you have no trouble with that.*

MR. FLYNT. Congressman, I see that a little differently. I am an absolutist when it comes to the Constitution. I don't feel there should be any obscenity laws; they should all be repealed. The American public should be able to do or read whatever they want, make their own decisions. *But when children come into it, that is where you have to*

draw the line, because you are violating someone's rights that cannot speak for themselves.

So my position only is what goes on between consenting adults. ***The minute a child is involved, regardless of the nature of the act, I don't think it even has to be obscene, as far as our definition of obscenity goes, that a violation of the law has taken place. . . .***

House Sexual Exploitation Hearings, supra 8a (Appendix B, Part II) at 270 (emphasis added).

APPENDIX F

The Statute in Question

For the convenience of the Court we set forth here the statute in question, New York Penal Law Section 263.15; with footnotes and bracketed material cross referencing other sections of the Penal Law which define its applicable terms:

§263.15 *Promoting a Sexual Performance by a Child*

A person is guilty of promoting[1] a sexual performance[2] by a child when, knowing the character and content thereof, he produces, directs or promotes any performance[3] which includes sexual conduct *actual or simulated*[4] [*sexual intercourse, deviate sexual intercourse,*[5] *sexual beastiality, masturbation, sado-masochistic abuse,*[6] or *lewd exhibition of*

---

[1] "Promote" means to procure, manufacture, issue, sell, give, provide, lend, mail, deliver, transfer, transmute, publish, distribute, circulate, disseminate, present, exhibit or advertise, or to offer or agree to do the same. [§ 263.00(5)]

[2] "Sexual performance" means any performance or part thereof which includes sexual conduct [i.e., conduct described in bracketed material in text] by a child less than sixteen years of age. [§ 263.00(1)]

[3] "Performance" means any play, motion picture, photograph or dance. Performance also means any other visual representation exhibited before an audience. [§ 263.00(4)]

[4] *"Simulated"* means the explicit depiction of any of the conduct set forth in subdivision three of this section which creates the appearance of such conduct *and* which exhibits any *uncovered portion of* the *breasts, genitals or buttocks.* [§ 263.00(6)]

[5] "Deviate sexual intercourse" means the conduct defined by subdivision two of section 130.00 of this chapter, [§ 263.00(7)] [as] "sexual conduct between persons not married to each other consisting of contact between the penis and the anus, the mouth and penis, or the mouth and the vulva". [§ 130.00(2)]

[6] "Sado-masochistic abuse" means the conduct defined in subdivision five of section 235.00 of this chapter, [§ 263.00(8)] [as] "flagellation or torture by or upon a person clad in undergarments, a mask or bizarre costume, or the condition of being fettered, bound or otherwise physically restrained on the part of one so clothed". [§ 235.20(5)]

the genitals (§263.00(3))] by a child less than sixteen years of age.

Promoting a sexual performance by a child is a class D felony. Added L. 1977, c. 910, §2. (Emphasis added.)

Certificate of Service

I hereby certify that on the 15th day of January, 1982, three (3) copies of the annexed motion for leave to file a brief *amicus curiae* and *amicus curiae* brief were mailed, postage prepaid, to:

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I further certify that all parties required to be served have been served.

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MOTION FILED
JAN 19 1982

Case No. 81-55

In The

SUPREME COURT OF THE UNITED STATES

October Term, 1981

THE PEOPLE OF THE STATE OF NEW YORK,

Petitioner,

v.

PAUL IRA FERBER,

Respondent.

On Petition For Writ Of Certiorari To
The New York State Court Of Appeals

MOTION FOR LEAVE TO FILE A BRIEF AMICI CURIAE BY CHARLES H KEATING, JR., AND CITIZENS FOR DECENCY THROUGH LAW, INC., AND BRIEF AMICI CURIAE IN SUPPORT OF THE PETITIONERS, THE PEOPLE OF THE STATE OF NEW YORK

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Charles H Keating, Jr., and Citizens for Decency through Law, Inc., the Moving Parties herein, respectfully move this Honorable United States Supreme Court, pursuant to Court Rule

36, for leave to file a brief as Amici Curiae in support of the Petitioners. Consent was granted by Petitioners and respectfully denied by Respondent.

Moving Parties have a special and fervent interest in the subject matter of this appeal, having devoted considerable time, study, and effort to assisting federal and state law enforcement authorities over the past twenty years in the enforcement of laws regulating and combating the commercial exploitation of obscene materials within this country. Charles Keating is the founder and co-counsel for Citizens for Decency through Law, Inc., formerly Citizens for Decent Literature, Inc., an Ohio corporation with over one hundred thousand contributors and supporters and with chapter affiliates throughout the United States. Citizens for Decency through Law, Inc. (CDL), is a

non-profit, non-sectarian, and non-political organization with its national headquarters formerly located in Cleveland, Ohio, now located at 2331 W. Royal Palm Road, Phoenix, Arizona, formed for and dedicated to the support of effective and rational obscenity laws and the efforts of governing legislative bodies in the passage of obscenity legislation through public education, the dissemination of existing and proposed obscenity laws, and lending legal assistance to prosecutors and law enforcement personnel.

Moving Party was also a member of the Presidential Commission on Obscenity and Pornography. Responding to the opening statement of Public Law 90-100, "The Congress finds that the traffic in obscenity and pornography is a matter of national concern.", Moving Party authored and released his findings in

the "Report of Charles H Keating, Jr., Commissioner", which explained the workings of the Commission and the wealth of statistical information and human experiences which prove the relationship between the purveyance of obscenity to crimes and other anti-social behavior. (Report released September 30, 1970.)

That Moving Party's personal efforts, and those of CDL, are shared on a national level is evidenced by the membership of one hundred forty-six past and present members of Congress and state governors, as well as respected and dedicated clergy, educators, prosecutors, media personnel, and corporate officers, who join in the function and goals of CDL and Mr. Keating.

The extent of Moving Party's involvement in the actual enforcement of

obscenity laws is evidenced by his having been plaintiff on behalf of the state of Ohio in an obscenity nuisance abatement action which was affirmed by the Supreme Court of Ohio, State of Ohio, ex rel. Charles H Keating, Jr. v. A Motion Picture Film Entitled "Vixen", et al., 27 Ohio St.2d 278, 272 N.E.2d 137 (1971), affirmed on remand from this Court, 35 Ohio St.2d 215, 301 N.E.2d 880 (Sept. 26, 1973).

Moving Party and CDL have also filed briefs amicus curiae in this Court urging that obscenity laws or convictions be upheld: Jacobellis v. Ohio, 378 U.S. 184, 12 L.Ed.2d 793, 1333 (1964); Memoirs v. Massachusetts, 383 U.S. 413, 16 L.Ed.2d 1, 1052 (1966); Ginzburg v. United States, 383 U.S. 463, 16 L.Ed.2d 31, 1079 (1966); Mishkin v. New York, 383 U.S. 502, 16 L.Ed.2d 56, 1082 (1966); Paris Adult Theatre I v.

Slaton, 413 U.S. 49, 37 L.Ed.2d 447, 1110 (1973); Heller v. New York, 413 U.S. 483, 37 L.Ed.2d 745, 1225 (1973); Jenkins v. Georgia, 418 U.S. 153, 41 L.Ed.2d 642, 1295 (1974); Marks v. United States, 430 U.S. 188, 51 L.Ed.2d 260 (1977); Splawn v. California, 431 U.S. 595, 52 L.Ed.2d 606, 883 (1977); and Vance v. Universal Amusement Co., 445 U.S. 308, 63 L.Ed.2d 413 (1980).

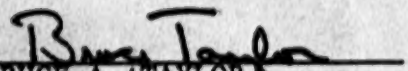
Furthermore and most recently, this attorney, Bruce Taylor, represented the Respondents, State of Ohio, in the case of Flynt v. Ohio, ___ U.S. ___, 68 L.Ed.2d 489 (1981).

Moving Parties hope to urge as amici that "child pornography" is inherently unprotected by the First Amendment, because it is "obscene" as a matter of law, and does not require the application of the "Miller Test" for regulation.

It is sincerely hoped that this Court will grant our Motion for Leave to File a Brief as Amici Curiae and allow us to participate in this cornerstone case which presents important issues for all the people of the United States as well as those of the State of New York.

Respectfully submitted,

CHARLES H KEATING, JR.
and
CITIZENS FOR DECENCY
THROUGH LAW, INC.

By: 

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On Petition for Writ of Certiorari To
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BRIEF OF AMICI CURIAE
IN SUPPORT OF PETITIONERS

PROPOSITION OF LAW

CHILD PORNOGRAPHY, AS DEFINED IN NEW YORK PENAL LAW SECTION 263.10(1), IS INHERENTLY OBSCENE AS A MATTER OF LAW AND IS UNPROTECTED BY THE FIRST AMENDMENT WITHOUT REGARD TO THE APPLICATION OF THE "MILLER TEST".

SUMMARY OF ARGUMENT

Amici respectfully submits to the consideration of this Court: (A) that child pornography should be viewed as malum in se and therefore inherently obscene and illegal; and (B) that these New York statutes only apply to those works which are truly pornographic and rightfully subject to such treatment.

The New York statutes, when read as a whole, proscribe a crime of dealing in child pornography which narrowly prohibits a certain malicious activity in a way which does not unconstitutionally restrict protected rights. These statutes can be read in a constitutional manner and, for the sake of a paramount interest in protecting children from abuse and exploitation, they must be so considered.

LAW AND ARGUMENT

A. Child Pornography Is Malum In Se And The Application Of The Miller Test Is Not Necessary To Protect Legitimate First Amendment Rights.

This Court has been faced with a "tortured history" of separating protected sexually oriented expression from the unprotected "crass commercial exploitation of sex". This Court has fashioned a test for prohibiting obscene matter for adult use in Miller v. California, 413 U.S. 15, at 24-25 (1973), and harmful matter for use by minors in Ginsberg v. New York, 390 U.S. 629 (1968). Child Pornography, however, is a new species, not previously contemplated under either of these tests, and requires the formulation of a new criterion specific unto itself. This task is more similar to the fashioning of the "indecency" standard

for radio and television which this Court dealt with in FCC v. Pacifica, 438 U.S. 726 (1978).

In Paris Adult Theatre v. Slaton, 413 U.S. 49, 57-64 (1973), this Court discussed the many concerns which legislatures and society may employ as a rational basis upon which to prohibit obscenity from the adult marketplace. In Ginsberg v. New York, supra at 636-43, the societal and governmental interests in guiding and protecting children were outlined and admitted to be a legitimate basis for the statutory treatment of what is harmful to minors as being in "rational relation to the objective of safeguarding such minors from harm". Id., at 643. The interest in protecting children from being used to perform for pornographic movies and magazines is obvious and virtually without contradiction. These reasons to

protect children from the porn makers and merchants are poignantly discussed by the Petitioner and by the Amicus Covenant House and need not be added to here. However, reference to the history of obscenity law shows that a new standard for child pornography is consistent with these concerns and interests and is supportable under our Constitution.

As stated in Chaplinsky v. New Hampshire, 315 U.S. 568, at 571-72 (1942):

> There are certain well-defined and narrowly limited classes of speech, the prevention and punishment of which have never been thought to raise any Constitutional problem. These include the lewd and obscene. . . . It has been well observed that such utterances are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social

> interest in order and morality. . . .

This principle was relied upon for dealing with obscenity in Roth v. United States, 354 U.S. 476, at 485 (1957), and in Miller v. California, supra at 20, but also applies to this case. Child pornography is so hideous and intolerable that it is in a class by itself and subject to regulation as utterly without First Amendment protection.

The concept of being mala in se is well suited to child pornography, if anything in law should be. Ballentine's Law Dictionary properly summarizes this time tested concept at page 766 of its Third Edition (1969):

> Mala in se. Inherently wicked, naturally evil, as adjudged by the sense of a civilized community; illegal from the very nature of the transaction, upon principles of natural, moral, and public law; immoral in its nature and

> injurious in its consequences, without regard to the fact of its being noticed or punished by the law of the state. 21 Am J2d Crim L § 25.

The practical approach to obscenity taken in Roth, supra at 487, simply stated:

> Obscene material is material which deals with sex in a manner appealing to prurient interest.[20] . . . [20] I.e., material having a tendency to excite lustful thoughts.

It was obvious to this Court at that time that such material would certainly be unprotected by the Constitution. Indeed, as this Court noted in Miller, supra at 21; "Roth presumed 'obscenity' to be utterly without redeeming social importance". Not until later did it become an added requirement to prove this lack of value. Memoirs v. Massachusetts, 383 U.S. 413, 418 (1966). This change was thought necessary to protect what the Court felt

was a legitimate work of literature even though it was sexually explicit. This new stress on the "value" of a work, regardless of its pruriency or offensiveness, has understandably misled the New York Court of Appeals to feel compelled to hypothesize some potential value in child sexual acts in potential "non-obscene" sexual "performances".

A more rational approach is to uphold the New York statute as allowing for the finding that knowingly promoting a sexual performance by a child involves obscenity per se which can be found in the same way that courts take "judicial notice". An excellent analysis of this concept in obscenity law is found in Mitchum v. Florida, 251 So.2d 298 (Ct. App. Fla. 1971).

The Florida court in Mitchum acted on the idea that "Courts are presumed to know what everyone knows." and stated

that "photographs can be so obscene . . . that the fact is incontrovertible".

Application of the "Miller Test" would only serve to determine three guidelines, all virtually irrelevant to child pornography. Would it matter if a filmed act of intercourse by children has "a tendency to excite lustful thoughts"? Would anyone argue that such acts are "patently offensive"? Would reasonable men differ, including doctors or educators, as to whether such photographs are useful for the pursuit of science, education or even art? Science and education and art can certainly live without using children as subjects and models.

There are items, universally recognized to be intrinsically dangerous, that the law presumes harmful and imposes strict liability. Such a "common good" theory supports the

regulation of machine guns, explosives, nuclear capability, "Saturday night special" handguns, drugs, dildoes, and acts such as incest, "blue sky law" schemes, pollution, public indecency, and unfair trade practices. Many of these concepts were noted in Paris Adult Theatre, supra at 61-62, 64, 67; and Miller, supra at 36.

Particularly important to this analysis is this Court's approval of Georgia's sexual devices law. In Sewell v. Georgia, 435 U.S. 982 (1978) and Teal v. Georgia, 435 U.S. 989 (1978), this Court upheld, by dismissing those appeals "for want of a substantial federal question", the Georgia "obscene materials" Section 26-2101(c), which provides that, in addition to material covered in subsection (b), "any device designed or marketed as useful primarily for the stimulation of human genital

organs is obscene material under this section." (See: Sewell, supra, 435 U.S. 982, 56 L.Ed.2d 76, at 77.) This prohibition against sexual devices, such as dildoes and artificial vaginas, was applied and upheld as allowing such items to be treated as "obscene" per se and subject to prohibition without reference to the "Miller Test". No seriously legitimate use is meant for such devices which would outweigh the balance of interests in favor of preventing traffic in such inherently prurient and offensive items. Child pornography, as defined by the New York law and within its legislative intent, is certainly as inherently illegal as sexual "rubber goods". This Court should treat the knowing traffic in child pornography to be without Constitutional question in similar fashion. The few legitimate uses of

sexual devices, by physicians or therapists, etc., are protected under the scienter requirement to the same degree that any necessary uses of child sexual activity would be reserved for bona fide medical, scientific, or sociological purposes.

Child pornography is a class of material separate and distinct from "adult pornography" in the same way that "obscenity" is distinct from "indecency". In FCC v. Pacifica Foundation, 438 U.S. 726 (1978), this Court recognzied that: "The ease with which children may obtain access to broadcast material, coupled with the concerns recognized in Ginsberg, amply justify special treatment of indecent broadcasting." Id., at 750. The resolution of this child pornography dilemma should follow the logic of Justice Sutherland and the Court in

Pacifica, at 750-51, where it was stated:

> [A] "nuisance may be merely a right thing in the wrong place, -- like a pig in the parlor instead of the barnyard." . . . We simply hold that when the Commission finds that a pig has entered the parlor, the exercise of its regulatory power does not depend on proof that the pig is obscene.

The nuisance variables of time, place, and manner will still be part of the application of Section 263.15 because the crime must be knowingly committed and the film or picture must be clearly promoted as an act of sexual conduct by a child. As discussed further below in Part B, scienter and pandering are factors which intrinsically weigh heavily in the application of this law and the statute cannot be read "in a vacuum". As this Court stated in Paris Adult Theatre, supra at 63, quoting Justice Cardozo, "all laws in Western

civilization are 'guided by a robust common sense' . . .".

Child porn is so universally condemnable and useless that even conceivably honest uses would gladly be foregone for the sake of preventing the market for such a trade. Serious medical studies and motion picture production certainly want no part of the sexual buying and selling of children as prostituted sex models. The law and courts are doing no one any favors by striking down the best protection children have for the sake of allowing for some bizarre perceived uses by legitimate scientists and artists. The logic in the notion that society needs access to any form of child sexual performances is so remote in reason that it "demeans the grand conception of the First Amendment and its high purposes in

the historic struggle for freedom". Miller, supra at 34.

B. The New York Statutes, Taken As A Whole, Narrowly Define The Offense So As To Prohibit Only Inherently Obscene Child "Pornography" And Not Legitimate Works Of Art Or Science.

The offense of "Promoting a sexual performance by a child", provided for in Section 263.15, must be read in pari materia with the definitions in Section 263.00, and with the intended scope of the whole of Article 263. This Article provides for three crimes, all aimed at the same industry and its abuses. Section 263.05 outlaws the actual use of children "to engage in a sexual performance". Section 263.10 prohibits the knowing promotion of obscene material which shows such a performance. Section 263.15 also prohibits the knowing promotion of such a performance.

It is clear from a plain reading of these statutes on their faces, when taken as a whole and read in relation to each other, that Section 263.15 was not intended by the Legislature to apply to writings or drawings of child sexuality, even if "obscene" under a "Miller Test". It is not aimed at a movie which depicts a child watching someone else in a sex act, nor to a child being inferred as committing sexual conduct. It, therefore, would not apply to a movie, such as Carnal Knowledge, in which sexual conduct "is understood to be taking place" but where "the camera does not focus on the bodies of the actors at such times" and there "is no exhibition whatever of the actors' genitals, lewd or otherwise, during these scenes". Jenkins v. Georgia, 418 U.S. 153, at 161 (1974).

This Statute would, therefore, not apply to Jody Foster's performance in the movie Taxi Driver, nor to Brooke Shields' in Pretty Baby or Blue Lagoon, since the camera never showed them doing any "sexual conduct" as defined in Section 263.00(3). Nor was such conduct even "Simulated" as defined in Section 263.00(6). Sex was admittedly intimated or supposed, but no more so than this Court found protected in Jenkins v. Georgia, supra. The law does not inhibit "legitimate" film making, and the First Amendment is applicable as far as it should be.

Nor is it reasonable for the Courts to attempt to invent "legitimate" uses or kinds of children performing intercourse or lewdly modeling their genitals before a camera. The Court of Appeals points to a perceived prohibition of "medical or educational

materials containing photographs of such acts" as an example of overbroad proscription of that which the Court apparently felt worthy of protection. Such a perception is not supported by the record in this case and the statute as applied by the District Attorney. It is reasonable to assume that the prosecutors and juries and reviewing courts would not seek to apply this statute to such uses, a presumption supported by past experience and future expectations. This question is better left to the wisdom expressed in Miller, supra at 25 and 26, that "the First Amendment values applicable to the States through the Fourteenth Amendment are adequately protected by the ultimate power of appellate courts to conduct an independent review of constitutional claims when necessary" and that in "resolving the inevitably sensitive

questions of fact and law, we must continue to rely on the jury system, accompanied by the safeguards that judges, rules of evidence, presumption of innocence, and other protective features provide". See also: Jenkins v. Georgia, supra. We must be mindful of the interpretations placed on the element of scienter by the New York Courts which highly protect the application of all such laws to knowing violators. See Mishkin v. New York, 383 U.S. 502, at 510-12 (1966), and Ginsberg v. New York, 390 U.S. 629, at 643-44 (1968). The New York Court of Appeals interpreted the "vital element of scienter" as follows (See: Ginsberg, at 644):

> A reading of the statute as a whole clearly indicates that only those who are in some manner aware of the character of the material they attempt to distribute should be punished. It is not innocent

but calculated purveyance of filth which is exorcised....

Consideration must also be given to the principle of "pandering" as relevant in a special way to child pornography under Section 263.15. In Ginzburg v. United States, 383 U.S. 463, at 466 (1966), this Court reviewed the materials involved in the context of "commerical exploitation of erotica solely for the sake of their prurient appeal", even though the federal statute does not contain such an element, nor an explicit knowledge requirement, nor sexual specificity, nor even a stated "test" of prurience. All these factors are presumed by this Court as matters of law and common sense statutory construction.

This Court, in Ginzburg v. U.S., supra, relied on a trial court record which clearly established a knowing and

calculated exploitation of sexual material which was not otherwise obscene even under the established "Roth Test". As stated in Ginzburg, at 466; "The record in that regard amply supports the decision of the trial judge that the mailing of all three publications offended the statute."

This practice of this Court in reviewing both state and federal convictions by looking to the mens rea of the defendant, rather than primarily at the material as a naked piece of evidence under a sterile "test", was a sound practice and gave both flexibility and Constitutional protection to those who either attempted to operate in good faith or maliciously exploited sexual acts. As stated by Chief Justice Warren in his dissent to Jacobellis v. Ohio, 378 U.S. 184, at 200 (1964), and

repeated by this Court in Miller, supra, 413 U.S., at 23, fn.5:

> For all the sound and fury that the Roth test has generated, it has not been proved unsound, and I believe that we should try to live with it--at least until a more satisfactory definition is evolved. No government--be it federal, state, or local--should be forced to choose between repressing all material, including that within the realm of decency, and allowing unrestrained license to publish any material, no matter how vile. There must be a rule of reason in this as in other areas of the law, and we have attempted in the Roth case to provide such a rule.

CONCLUSION

The knowing promotion of a sexual performance by a child under Section 263.15 is both an inherently heinous crime and an act of pandering which allow the concepts of "variable obscenity" and "indecent nuisance" to treat child pornography distribution as a crime distinct from obscenity for

adults. The history of obscenity jurisprudence provides many rules of law which, when applied to this statute, dictate that this Court should conclude that Section 263.15 cannot be said to be unconstitutionally overbroad or vague. The New York Court of Appeals was misled in its interpretation of this Court's field of pornography decisions and the present case allows this Court to apply its decisions in a constitutional manner so as to uphold this statute.

If the jury was told that they could have imposed a greater penalty by finding the films obscene as well as child pornography, they undoubtedly would have done so. However, with both crimes providing for the same conviction, it is no wonder they chose to forego the added burden of

determining all the complicated facets of the "Miller Test". The jury recognized that the defendants were child pornographers and it mattered little to them that the films were also obscene. They knew the act was wrong, independent of "obscenity", and this Court should say that the law is, indeed, presumed to know what everyone knows. This Court should admit that child pornography is wrong because it is inherently obscene, indecent, a nuisance per se, and an unforgivable offense against society within the reach of New York's Section 263.15.

Maleficia non debent remanere impunita, et impunitas continuum affectum tribuit delinguenti. (Evil deeds ought not to remain unpunished, for impunity offers constant encouragement to the wrongdoer.)

Respectfully submitted,

CHARLES H KEATING, JR.
and
CITIZENS FOR DECENCY
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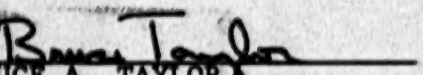
By: 
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MOTION FILED
DEC 22 19

No. 81-55

IN THE

Supreme Court of the United States

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Petitioner,

—against—

PAUL IRA FERBER,

Respondent.

ON WRIT OF CERTIORARI TO THE
NEW YORK COURT OF APPEALS

MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE* AND BRIEF *AMICUS CURIAE*

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No. 81-55

In The

SUPREME COURT OF THE UNITED STATES

Octber Term 1981

The People of the State of New York,

Petitioner,

--Against--

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Morality in Media, Inc. hereby respectfully moves for leave to file the attached brief amicus curiae in support of the People of the State of New York

in the above matter for which certiorari has been granted and which is now pending "on the merits". The consent of the attorney for the Petitioner has been granted. The consent of the attorney for the Respondent was requested but refused.

INTEREST OF MORALITY IN MEDIA, INC.

Morality in Media, Inc. is a New York not-for-profit, interfaith charitable corporation, organized in 1968 for the purpose of combatting the distribution of obscene material in the United States. This organization, now national in scope, has affiliates in six states and Puerto Rico. It corresponds 8 times a year with over 40,000 recipients of its newsletter located in every state of the United States. Its Board of Directors and National Advisory Board are composed of prominent businessmen, clergy and

civic leaders. Its national headquarters is located at 475 Riverside Drive, New York, New York 10115.

The President of Morality in Media, Inc. is Reverend Morton A. Hill,S.J. In 1968 Father Hill was appointed to the Presidential Commission on Obscenity and Pornography. He, along with Doctor Winfrey C. Link, produced the "Hill-Link Minority Report of the Presidential Commission on Obscenity and Pornography"[1]

Morality in Media, Inc. files this motion and brief supporting the position of the People of the State of New York because it believes that the decision in this matter will be of grave

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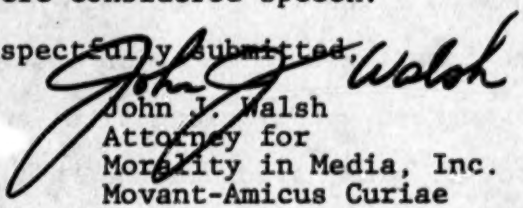
1. The "Hill-Link Minority Report" was cited by this honorable court in Kaplan v. California, 413 U.S. 115, 120n.4, 93 S.Ct. 2680, 2684 n.4, 37 L.Ed. 2d 492 (1973), and Paris Adult Theatre I v. Slaton, 413 U.S. 49, 59 n.7 and n.8, 93 S.Ct. 2622 at 2635 n.7 and 8, 37 L.Ed. 2d 446 (1973).

importance to all children in the United States and to their parents. It believes that its brief contains arguments not raised by the parties, in particular its contention that such depictions are not and never were considered speech.

Respectfully submitted,



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BRIEF AMICUS CURIAE

Statement of Interest

As more fully explained in the accompanying motion, Morality in Media, Inc. is a non-profit organization dedicated to combatting obscenity, pornography and indecency in media. Morality in Media, Inc. is before the Court as

amicus curiae to urge restraint of the most debasing form of obscenity - Child Pornography.

SUMMARY OF ARGUMENT

Morality in Media, Inc. contends that the "Liberties" protected by the Fourteenth Amendment from abridgement by the states never did include and do not include the right to distribute motion pictures or other pictures depicting children of tender years engaged in sexual intercourse or other types of sexual conduct described in the New York Statute stricken by the New York Court of Appeals. If amicus is correct in this contention, it follows that there is no constitutional inhibition on the Legislature of the State of New York in enacting such legislation, provided that such

legislation is "Not Irrational".[2] Amicus contends that this qualifying test has been met.

Secondly, amicus contends that Miller v. California[3] does not restrict Congress or the States to the regulation of only that which is obscene, but that where important state interests, unrelated to expression are at stake, regulation can extend also to that which is "Indecent". Amicus contends that the regulation struck down was a proper regulation of "Indecent" material. Amicus points out that the statute struck down, in effect was also a regulation of "obscene" material even if all three prongs of Miller were not required.

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2. Roth v. United States, 354 U.S. 476, 501 1 L.Ed. 2d 1498, 1516 (Harlan concurring in Alberts) (1957); California v. LaRue, 409 U.S. 109, 118, 34 L.Ed. 2d 342 at 352.

3. 413 U.S. 15, 37 L.Ed. 2d 419 (1973).

ARGUMENT

I

THE DISTRIBUTION OF PICTURES OF CHILDREN OF TENDER YEARS ENGAGED IN SEXUAL ACTS IS NOT ONE OF THE "LIBERTIES" PROTECTED AGAINST STATE INFRINGEMENT BY THE FOURTEENTH AMENDMENT

The lower Court opinion of the extent to which the First Amendment applies presents a strange anomoly. Since the First Amendment applies only to Congress, support for its view must be found in the provision of the Fourteenth Amendment which protects the "Liberties" of the people against infringement by the states.[4] The New York Court of Appeals has in effect decided that the freedom to distribute pictures or motion pictures of children engaged in sexual acts is one of

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4. Palko v. Connecticut, 302 U.S. 319, 325 (1937).

these "liberties". It is clear that no support for this view can be found in the Fourteenth Amendment itself nor in the Supreme Court cases interpreting the nature of that liberty.[5]

The myopia revealed in the

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5. "The freedom of Speech which the First Amendment safeguards against encroachment by Congress" is within the concept of oredered liberty protected against restraint by the states. DeJonge v. Oregon, 299 U.S. 353, 364 (1937); Gitlow v. New York, 268 U.S. 672 (1925); Stromberg v. California, 283 U.S. 359, 368; Near v. Minnesota, 283 U.S. 697, 707; Beauharmais v. Illinois, 343 U.S. 250, 258 (1952); Grosjean v. American Press, 297 U.S. 233, 243, 244; Buckley v. Valeo (Rehnquist), 424 U.S. 1, 291; Paul v. Davis, 424 U.S. 693, 713 (1976).

It should be noted that the Fourteenth Amendment, which is the basis for the lower court's belief that there is a "freedom" therein protected to distribute pictures of children masturbating, was passed by Congress in 1866 and ratified in 1868 but child pronography is a decadence that was nonexistent prior to 1970.

Lower Court opinion results from a doctrinaire application of Miller v. California. The assumption is made that no Court, not even the Supreme Court, nor any legislative body will ever be able to discover or prohibit any other forms of

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The Report of the Presidential Commission on Obscenity and Pornography in 1970 said at Page 115, "The taboo against peodophilia, however, has remained almost inviolate. The use of pre-pubescent children in stag films is almost non-existent". See also "Child Pornography" by Sneed, Bliss and Mosely, Chicago Tribune, May 15, 1977. The Supreme Court is not at liberty to engraft upon a statute or the constitution, a meaning inconsistent with its historical limitations. Cf. Moody v. Albemarle Paper Co., 417 U.S. 622, 626, 41 L.Ed. 2d 358 (1974). The object of the Supreme Court in construing legislation is to give effect to the legislative will. Philbrook v. Glodgett, 421 U.S. 707, 713, 44 L.Ed. 2d 525 (1975). Terms used in a constitutional amendment should be interpreted in accordance with the meaning they had at the time the Amendment was adopted. (Cf. Decennial Digests, "Constitutional Law", Key 19). To abolish the right to distribute pictures of children masturbating is not to violate the principle of "ordered liberty" since

expression not covered by the three pronged Miller test from here to eternity.

Snyder v. Massachusetts, 219 U.S. 97 at 114 (1933) warns us that "a fertile source of perversion in constitutional theory is the tyranny of labels. Out of the vague precepts of the Fourteenth Amendment a court frames a rule which is general in form...Forthwith another situation is placed under the rule because it is fitted to the words, though related faintly, if at all, to the reasons that brought the rule into existence".

It is helpful under such a state of facts to study the Roth-Alberts decision where the Supreme Court first made a definitive ruling that while obscenity is an "utterance" it is "not within the area

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since such abolition would not violate a "principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental". (See Palko v. Connecticut, 302 U.S. 319 at 325 (1937).

of constitutionally protected speech or press". Amicus says that it is demonstrable that the same analysis that persuaded the Roth Court that such utterances have never been within the area of constitutionally protected speech or press will impel this Court to "find" that the distribution of motion pictures and pictures of children of tender years engaged in sexual acts is not within the area of constitutionally protected speech or the press regardless of whether such depictions meet the Miller three-pronged obscenity definition.

Roth throws light on the meaning of the word "liberty" used in the Fourteenth Amendment in so far as liberties of free speech and the press are concerned when it is said:

> "The protection given speech and press was fashioned to assure unfettered interchange

> of ideas for the bringing about of political and social changes desired by the people."[6]

No clearer exposition that pictures of children engaged in sexual conduct is not an "interchange of ideas for the bringing about of political and social changes desired by the people" may be found than Roth's citation of a letter of The Continental Congress. At 1 L.Ed. 2d 1506 that Court said of the above concept that:

> "This objective was made explicit as early as 1774 in a letter of the Continental Congress to the inhabitants of Quebec:
>
> 'The last right we shall mention regards the freedom of the press. The importance of this consists, besides the advancement of truth, science, morality, and arts in general, in its diffusion of liberal

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6. 354 U.S. 476, 484, 1 L.Ed. 2d 1506 (1957).

> sentiments on the administration of Government'..."[7]

Can it conceivably be argued that the distribution of the pictures or films we have described advances truth, science, morality, the arts or political thought? --Of course not! They fall into that area described in Roth[8] and Chaplinsky v. New Hampshire[9] as

> "...Utterances" (that) "are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality..."

Roth indicated that the freedom of speech and the press to be protected

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7. 354 U.S. 484, 1 L.Ed. 2d 1506 (1957).

8. 354 U.S. 485, 1 L.Ed. 2d 1507 (1957).

9. 315 U.S. 568, 571, 572, 86 L.Ed. 1031, 1035 (1941).

was 'for material which does not treat sex in a manner appealing to prurient interest.'[10]

Is anyone prepared to argue that the commercial distribution of pictures showing children engaging in sexual acts is not material designed and deliberately marketed to appeal to the interest in pruriency regardless of the fact that that requirement is not specifically set out in the statute or that proof of lack of serious value not specifically required?"[11] Certainly Roth intended to

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10. 354 U.S. 486, 1 L.Ed. 2d 1508 (1957).

11. Miller v. California, in footnote 2 includes among the definitions of obscene that which is "Disgusting to the senses", "Grossly repugnant to the generally accepted notions of what is appropriate", "Offensive or revolting", "Offensive to the senses, or to taste or refinement", "Disgusting", "Repulsive", "Filthy", "Abominable", "Loathsome"--The Ferber material fits all of these definitions and is "obscene" under the definition of that term cited in

bar such material. Miller did not deign to change or overrule Roth or its philosophical underpinning.

The Miller Court, at 413 U.S. 34, said:

> "In our view, to equate free and robust exchange of ideas and political debate with commercial exploitation of obscene material demeans the grand conception of the First Amendment."

A fortiarari is not the First Amendment demeaned when it is cited as a defense to the distribution of debasing depictions of young children regardless of the Miller formulation?[12]

The case of Robertson v. Baldwin,

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the Miller footnote.

12. "The majority of children recruited into this business range in age from 9 to 14 years..the majority of contacts in Kiddie Porn...are young boys. (F.B.I. Law Enforcement Bulletin, February 1979 "Child Pornography" Page 18 et seq.

165 U.S. 275 (1896) quoted with approval in Roth is dispositive when it said at Page 281:

> "The law is perfectly well settled that the first ten amendments to the Constitution, commonly known as the Bill or Rights, were never intended to lay down any novel principles of government, but simply to embody certain guarantees and immunities which we had inherited from our English ancestors and which from time immemorial been subject to certain well recognized exceptions... which continued to be recognized as if they had been formally expressed. Thus the freedom of speech and of the press does not permit the publication of libels, blasphemous or indecent articles, or other publications injurious to public morals..."

ARGUMENT

II

THE STATE OF NEW YORK'S RIGHT TO MAINTAIN A DECENT SOCIETY PERMITS IT TO PUNISH THE DISTRIBUTION OF FILMS AND PICTURES THAT SHOW CHILDREN OF TENDER YEARS ENGAGED IN SEXUAL ACTS IF SUCH DEPICTIONS ARE INDECENT.

It should be noted that the Supreme Court of the United States subsequent to Miller found no difficulty in upholding 18 U.S.C. 1464 wherein Congress has proscribed "Indecent" material which was not obscene.[13] The government interest therein protected was the invasion of the privacy of the home bolstered by a

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13. F.C.C. v. Pacifica Foundation, 438 U.S. 726, 57 L.Ed. 2d 1073 (1978); Nor did the Supreme Court in the past have any difficulty supporting police power to forbid the "indecent" as well as the obscene. See United States v. Chase, 135 U.S. 255, 261 (1889); Ex Parte Jackson, 96 U.S. 727, 737 (1877); Robertson, supra.

limited concern for minors. This decision clearly refutes the generality that media content can be proscribed only if Obscene. What New York has done is to proscribe a species of conduct which if not obscene under Miller certainly fits the definition of "Indecent". In Pacifica the Supreme Court of the United States defined that term as "Non-Conformance With Accepted Standards of Morality"[14] If Congress, post Miller, can

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14. Other definitions of indecent include "calculated to promote the general corruption of morals", United States v. Bennett, 24 F. Cas. 1093, 1102 (S.D. N. Y. Cir.) (1879); "Something unfit for the eye or ear", United States v. Loftis, 12 F. 671, 672 (D.Ore. 1882); "Unfit to be seen or heard", United States v. Bebout, 28 F. 522, 524 (W.D.Ohio 1886); "That which shocks the ordinary and common sense of men as indecency", United States v. Davis, 38 F. 326, 328 (W.D. Tenn. Cir.)(1889); "Great unseemliness or gross offensiveness, especially in relation to sexual matters", Webster's Seventh New Collegiate Dictionary, G & C Merrian Co.).

regulate material that is indecent but not obscene, so too can the states where there are important state interests at stake. These obvious interests are the well-being of children,[15] the prevention of their sexual exploitation[16] and the state's interest in morality.[17]

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15. Prince v. Massachusetts, 321 U.S. 158 (1944). "Testimony has been offered that between January 1976 and June 1977 as many as 300,000 children have been subject to sexual exploitation nationally", "Child Pornography", U. S. News, June 13, 1977.

16. It is to be noted that this is an "Imortant governmental interest" that is furthered that is "Unrelated to the suppression of free expression". Cf. People v. Donald Weiner, N.Y.L.Jo., November 19, 1981, Page 18, Col. 6 construing Section 263.05 of the Penal Code. Since "free speech", however, is not at issue it is not necessary to examine whether a "compelling" state interest is involved. Cf. "Child Pornography", U. of Ill. Law Forum, 1978 No. 3, Pages 741, 742.

17. Paris Adult Theatre I v. Slaton, 413 U.S. 49, 61; Ex Parte Jackson, 96 U.S. 727, 736 (1877).

Various of the governmental interests spelled out to justify the validity of Obscenity legislation, are equally applicable to "Indecent" depictions of chilren engaged in sexual acts. These include the interest of the public in the quality of life and the total community environment, the tone of commerce in the great city centers and possibly the public safety itself. See Paris Adult Theatre I v. Slaton, 413 U.S. 49 at 58.

"Rights and interest other than the advocates are involved". Cf. Bread v. Alexandria, 342 U.S. 622 (1951).

Slaton quotes Professor Alexander Bickel to the effect that

> "Even supposing that each of us can, if he wishes, effectively avert the eye and stop the ear...what is commonly read and seen and heard and sone intrude upon us all, wanted or not"[18]

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18. 413 U.S. 49 at 59.

Professor Bickel in 1974, writing in Where Do You Draw The Line,[19] elaborated on this thought when he wrote:

> "Even speech, which advocates no ideas, can have its consequences. It may inflict injury by its very utterance as the Court said a generation ago in the Chaplinsky case of lewd or profane or fighting words. More and equally important, it may create a climate, an environment in which conduct and actions that were not possible before, became possible."

How prophetic are these words!

Irving Kristol writing in the same publication[20] puts it thus:

> "What is at stake is civilization and humanity, nothing less...the matter of obscenity and pornography is not a trivial one." (Emphasis added)

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19. Brigham Young University Press, Edited by Victor B. Cline (1974) at page 72.

20. Id. at Page 51.

It is also quite apparent from this exposition that where the welfare of children is a consideration, a perception by the legislature of the State of New York that that welfare is advanced by this law is not "irrational".

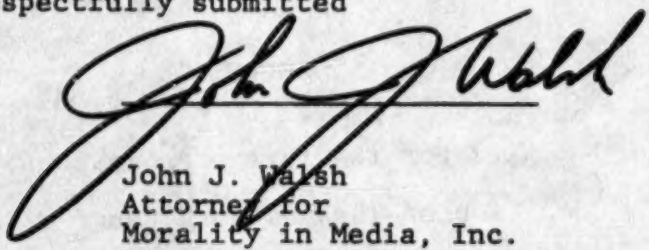
CONCLUSION

For the foregoing reasons, the decision of The New York Court of Appeals is erroneous and should be reversed. It is an abomination to suggest that a film depicting children of tender years being exploited by having them engage in sex for the titillation of sick adults must be examined for lack of serious value. Is it to be the rule that an "artistic" depiction of such children will save it from proscription or that it must be "considered as a whole"? No. - Such a picture has the status of self-proving

pornography - Res Ipsa Loquitor and any civilized society must condemn it out of hand. Paris Adult Theatre I v. Slaton, supra, reminds us that the State has a right to maintain a "Decent Society".

DATED December 21, 1981

Respectfully submitted



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CERTIFICATE OF SERVICE

I hereby certify that on the day of December 1981, three (3) copies of the annexed motion for leave to file a brief Amicus Curiae and Amicus Curiae brief were mailed, postage prepaid, to:

(1) Robert M. Morgenthau,
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New York County
Attorney for Petitioner
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and

(2) Herald Price Fahringer, Esq.
Attorney for Respondent
540 Madison Avenue
New York, New York 10022.

I further certify that all parties required to be served have been served.

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32 Court Street
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Attorney for Morality In Media, Inc.
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